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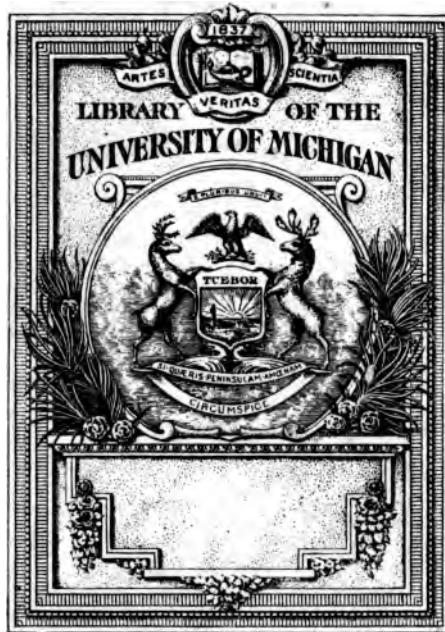
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**OCCASIONAL PAPERS
AND ADDRESSES
OF
AN AMERICAN LAWYER**



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**OCCASIONAL PAPERS
AND ADDRESSES
OF
AN AMERICAN LAWYER**

**BY
HENRY W. TAFT
OF THE NEW YORK BAR**

**New York
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1920

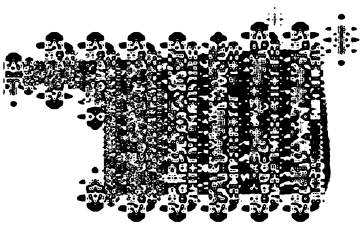
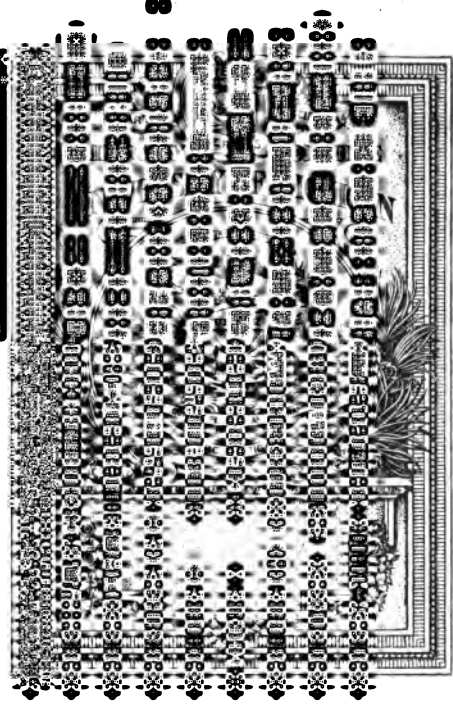
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INTRODUCTION

The fugitive papers and addresses contained in this volume are the by-product of a busy professional life. They were prepared during the last decade; and yet the march of events has been so rapid that little more than a historic interest now attaches to the subjects they deal with. Their publication in a book was suggested by the difficulty I have encountered in collecting addresses of my father delivered three-quarters of a century ago. Aside from the desire to put in a permanent form the results of some labor, I have some hope that the publication of the contents of this volume may have some effect upon the younger members of the legal profession in stimulating them not only to greater effort in promoting the effective administration of justice, but also to a more active performance of the duties of citizenship.

The pursuit of an absorbing profession in a metropolitan city leaves little time for the indulgence of tastes in the fields of general culture. The law is such a jealous mistress that she does not suffer gladly even dilettante ramblings in art or science or literature. If a lawyer does disentangle himself from the phylacteries of a system of law and procedure whose practice frequently tends to a narrowness of vision, he quite naturally turns to some phase of public affairs, and, moreover, as I have pointed out in these papers, a sense of public duty ought to press him, more than those engaged in other pursuits, in that direction. But the complexities of modern existence in America

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militate against actual office-holding by a lawyer. An interruption of professional activities is generally detrimental. There are so many competent lawyers that there is little difficulty in replacing those who forsake for politics their practice at the bar; and a lawyer who yields to the allurements of public life by accepting office generally finds that the political prestige he gains is of little practical use and that on returning to the law he must make new professional connections. In England the case is quite different and leaders of the bar may continue to practice their profession while they engage in parliamentary activities.

To participate in partisan politics in a great city like New York, and, at the same time, build up and keep together a law practice, is most difficult. It is surprising how few men of real talent have performed the double rôle of lawyer and politician. This always becomes manifest when the state or federal appointing power seeks to fill vacancies on the bench. Lawyers of eminent qualifications for such positions are numerous, but to find those who are politically anything more than ciphers is most difficult. And yet it ought to be possible to maintain a first-rate position at the bar and at the same time acquire an influence in politics of sufficient importance to enable a lawyer to contribute something to the elevation of the tone of our public life. By training, environment and aptitude, lawyers are usually well equipped to engage in political activities, and if circumstances do not permit them to hold office, at least they may and ought to devote a substantial part of their time to the discharge of the duties and responsibilities of citizenship. Conspicuous examples show that this can be done without detriment to professional success. The career of Mr. Elihu Root is a striking illustration. No member of our bar de-

voted himself more assiduously to the practice of his profession until after he became fifty-five years of age, when he entered Mr. McKinley's Cabinet. With the exception of a brief period when he was United States Attorney for the Southern District of New York, he had for many years, without holding office of any kind, kept so closely in touch with political and party affairs as to be a factor whom leaders of party organizations could not afford to ignore.

I am led by this comment on Mr. Root's career to advert to the efforts of lawyers from other parts of the country who have achieved national fame in public life and have presumed upon the reputation thus acquired to enter the ranks of the working bar of New York City. A few have succeeded,—if success consists in making adequate incomes through connections formed on account of their prestige; most, however, have failed, and to their bitter disappointment. That they should attain at the numerous and competent bar of a great city a position commensurate with a repute acquired in other fields, has been generally shown to be impossible, and when the glamour attaching to public office has—as it generally has—become dimmed, the exotic lawyer and the retired statesman either must content himself with an obscurity that irks, or return to the field of his earlier activities.

In an address to the students of the Harvard Law School printed in this volume, I attempted to point out some of the conditions under which the modern practice of the law must be conducted. In thirty-eight years of observation I have seen the most radical changes. In my early days at the bar the leaders were great advocates. Indeed, forensic power and its habitual exercise in the trial of great causes of all kinds, combined with force and elevation of character, were

the qualities esteemed to be necessary for leadership. From its foundation in 1870, the presidency of the Association of the Bar of the City of New York was the blue ribbon of professional life, and for more than thirty years it was awarded to men eminent as advocates. Thus we had a long line of men of the highest distinction such as William M. Evarts, Stephen P. Nash, Francis N. Bangs, James C. Carter, William Allen Butler, Joseph H. Choate, Frederic R. Coudert, Wheeler H. Peckham, Joseph Larocque, John E. Parsons, William G. Choate and Elihu Root. In later years, however, we find the Presidents of the Bar Association distinguished not so much for their forensic talent or their frequent appearance as advocates, as for the esteem in which they were held for qualities of leadership based upon personal character, general legal attainments, and occasional appearances in the trial of the great litigations such as have become in the last generation more frequent in settling the relations between corporate interests and the agencies of government. It may be said with certitude that conspicuous talent in advocacy, prestige on account of reputed ability in obtaining results in court, and vogue among the lay public, have ceased to play such an important part in determining leadership at the bar as they did forty years ago.

It is perhaps due to the tradition surviving from the old order that there commonly prevails among the lay public an idea that a lawyer's experience cultivates an aptitude for public speaking on general topics. But, while generalization where so many exceptions must be made is dangerous, I have observed that the pursuit of advocacy in the courts, particularly under modern conditions, while it leads to compression and lucidity of statement, tends to the impairment rather

than the cultivation of the art of oratory. In jury trials eloquence is frequently an effective weapon, but more and more in this intensely practical age unadorned statements of the facts and unemotional stimulation of the reason have taken the place of rhetorical flights and emotional appeals. The modern lawyer is continually making *points*, and lucid exposition and persuasive logic have more effect than flights of fancy, rhetorical decoration, and even humor and wit. The modern judge has little time to listen to anything except a naked discussion of the facts and the law, and even jurymen do not now tolerate such extended oratorical efforts as those we read of in the early history of the profession.

On an occasion where there is not to be an orderly treatment of some serious subject (I have included in this collection several addresses on such occasions which I fear may seem rather sporadic,—where, I say, speakers may select their own subjects, or confine themselves to none, grace in delivery and expression, lightness of touch, play of the imagination and humor or pathos, will make an appeal, and a modern lawyer does not find himself qualified by habit for an effective performance. And while brilliant speakers there have been among the members of the bar, such men, for instance, as Mr. Evarts, Mr. Choate, Mr. Hedges and Mr. Beck, they have possessed the spark of oratory not because they were lawyers but in spite of that fact.

I have to some extent touched upon the cause of the changes which have thus affected the lawyer. At this point it is sufficient to indicate that it is undoubtedly in large part due to the evolution (I might almost say revolution), which has been in progress during the last generation in certain phases of our national life. The

most important contributions of the legal profession to the recent development of the economic, industrial and political life of the country have been those which have been constructive; that is, those which have aided in putting into practical operation within the law, great conceptions of the modern leaders of finance and industry. However necessary and however inevitable litigations commanding the services of the ablest lawyers may still be, most controversies in court do not directly contribute much to human progress. In the intensely practical transformation this country has experienced in the last generation, litigation has come to be frequently viewed by the public, especially that part of it which is engaged in great business enterprises, as an obstacle to enterprise. It is no doubt due to this fact that leaders of the bar have, much less than formerly, sought employment in active litigation and have confined themselves, where they do appear as advocates, to the great causes which are incident to the enforcement of recent statutory enactments relating to our economic and commercial development, such, for instance, as the Anti-Trust Law.

But it is not alone the practical effect of such conditions as these that has affected the legal profession in particular and the administration of justice in general. The public mind during the last generation has been intensively occupied with efforts to solve pressing problems of sociology. This condition produced one of the most resolute assaults in our history on our judicial system. There was little more of an armament for the attack than an appealing phrase. "Social Justice" which had no more practical value as a basis for an ordered system of law than the elevated sentiments of the ephemeral constitution of the French Revolutionists, threatened to dislodge some of

the keystones in parts of the structure of our judicial system which, from the standpoint of both the peculiar character of our polity and its historical development, were characteristically American. But such a revolt was not new in our history. Indeed, it began early in the history of our government. Essentially it was a modern phase of a tendency in all governments based on universal suffrage to become periodically impatient of restraints imposed by fundamental law. If its avowed purpose to destroy the independence of the judiciary had succeeded, it is not probable that our federal government would long have endured, nor would the system of common law administered in the state and federal courts long have continued to protect the rights of the individual citizen.

The recall of judges and the recall of decisions could never have been made to occupy the public mind, or to become a menace, if it had not been advocated by one of the most extraordinary politicians and statesmen of his day. Neither the Republican nor the Democratic party would have had the hardihood to adopt as a basis for a political contest such a radical political doctrine. Jefferson's attacks were chiefly directed at the power of the federal judiciary. It is doubtful whether even he would have taken the political risk of a campaign upon a platform seeking to destroy the judiciary department as an independent organ of both the state and the federal government, by subjecting judicial decisions to the test of a referendum.

Whenever attacks upon the courts have been made in this country, they have resulted from a sort of straining against the constitutional fetters whose purpose has been to prevent inter-departmental usurpa-

tions or to limit the sovereignty of the states; or they have been a mere inarticulate manifestation, common, as I have said, in democracies, of impatience at restrictions imposed upon the political action of the people.

Those who seek to affect the independent character of the judiciary branch of the government have not generally realized that their attack is upon the feature of our federated system which contributes more than any other to its stability, and without which it probably would not have survived the first century of its existence. In the case of Mr. Roosevelt, if the problem had been merely a juridical one, involving general principles of jurisprudence, it would not have been surprising if he had failed fully to grasp its importance, for his education as a lawyer was not much more than superficial, and his experience and temperament led him to view public questions from a viewpoint quite different from that of a trained lawyer. But the weakening of the judiciary department as an independent organ of government would affect the system of checks and balances by which the framers of the Constitution sought to establish an equilibrium among the three departments of the Federal Government, and between the enumerated powers of the central government on the one hand and the reserved powers of the several states on the other; and a correct forecast of its probable effect upon our institutions required examination of and reflection upon the history of the proceedings of the Constitutional Convention of 1787, the state conventions which ratified the Constitution, the writings of Hamilton, Madison and Jay, and the opinions of Marshall. Both because of Mr. Roosevelt's position as an American historian and a man of letters, and because he had been for years a

practical statesman observing the workings of the federal system, one would have expected that he would give decisive weight to historical considerations and would realize the vital importance of maintaining the delicate inter-departmental balance in the federal system, and of preventing the co-existing but reciprocally exclusive sovereignties of the central government and the states from getting into a condition of unstable equilibrium.

But while Mr. Roosevelt was a man of the highest impulses, he did not always, and especially when he was moved by a sense of some immediate injustice, take account of consequences or permit the intrusion of cooling reflection based upon the teachings of experience; and, as I have intimated, at no time in his career did he have much sympathy with anything that was legalistic. He continued to the end of his life to view slightly what he characterized as "law honesty."

I remember when Mr. Roosevelt and I were studying law at the Columbia Law School in 1881, Professor Theodore W. Dwight on one occasion announced with didactic emphasis, some familiar and long-established proposition of law. A tow-headed young man arose in the back of a crowded class-room and with a trace of pugnacity said, "Professor Dwight, is that the law?" "It is, sir," came back with the verbal rapid fire of the famous Professor, so familiar to his students; to which Mr. Roosevelt had the last word in an impulsive staccato "Well, it ought not to be." When, more than a quarter of a century later the idea of social justice became a favorite topic of a school of economists, a similar impulse seized upon Mr. Roosevelt's imagination, and with characteristic impetuosity he sought to better the condition of the people

by an emasculation of the judiciary system, without giving due weight to the broader question of its effect upon the entire governmental structure. Furthermore, its advocacy had certain alluring political advantages.

But these facts do not completely account for the advocacy by Mr. Roosevelt of the recall. Strange as it may seem, he sympathized with the fear, somewhere expressed by Mr. Jefferson, that the system of government established by our Constitution would, like an unwound clock, run down. Both of these statesmen thought that the checks by which the powers of the three departments of government were to be sustained in even balance might result in the paralysis of all effective governmental power. While Mr. Roosevelt generally had little sympathy with Mr. Jefferson in his political philosophy, he did believe that the power of the executive ought to be co-extensive with any emergency calling for its exercise. In other words, while he would perhaps not have formulated the dogma quite so plainly, he nevertheless in practice was strongly inclined to act upon the theory that the powers of the executive and the administrative branches of government, were to be exercised at the discretion of the executive to any extent necessary for emergent purposes, except so far as they were expressly limited by constitutional or statutory provision. He believed that by implication the executive was vested with plenary power to conduct all governmental operations, except so far as such power was limited by express grant to the legislative branch.

Now, a statesman entertaining such views as to the character of our governmental structure could hardly be expected to be deeply impressed with the necessity of maintaining the balance among the three depart-

ments of government. Temperamentally, if not by conviction, Mr. Roosevelt believed (and there is a large measure of truth in this view), that the legislative department, consisting of two houses, frequently of opposite political parties, and also with equal frequency failing to coöperate with the executive, was not an efficient organ of government. His vigor and extraordinary determination to accomplish results which he believed would be for the good of the people, led him, therefore, to the belief that only by the expansion of the administrative power could the government perform its proper function; and it is not altogether surprising that he should have failed, under the influence of the desire to improve the condition of the less fortunate in life, to yield to the temptation of advocating a diminution of the powers of the judiciary department, even though it had only a sort of veto power and could perform no affirmative function of government. In the last years of his life reflection and the recession of the progressive wave, seem to have led him to abandon the views which he had so vigorously pressed; at least he ceased to make them a guide for his political conduct.

I did not intend to be led into an estimate of Mr. Roosevelt's character and public career. But disapproval of his course on the recall ought not to permit us to forget the services of permanent value which he rendered to his country. I would not attempt to sum these all up; the task would be too long for this introduction. I will content myself by adverting to two things which he contributed to our national life and which were of inestimable value.

The first of these was the interest in public affairs which he was, through his boundless enthusiasm, able to arouse among multitudes of his countrymen, who

through lethargy or indifference, had failed to pay the price which the successful maintenance of a democratic form of government inexorably demands; that is, some affirmative effort and some sacrifice of personal interest and comfort, for the benefit of the general welfare.

Of the second great accomplishment of Mr. Roosevelt there is evidence in concrete results. I refer to what he did, not only in compelling great business combinations to obey the law, but in the far more subtle and difficult task of elevating the ethical standards which great business organizations, particularly those in corporate form, have adopted as a guide in the conduct of their affairs. Mr. Roosevelt's distinction and his greatest value to his country lay in his ability as a crusader against dishonest, selfish and unpatriotic methods of doing business, which threatened at one time by their excesses to convert the body politic into what would have been measurably near a plutocracy. Largely through his leadership, the danger of such a result was permanently removed and principles of justice and honesty and moderation in business methods were firmly indoctrinated. I have recently been reading some of the correspondence of von Bernstorff with the German Foreign Office before we entered the war. The German Ambassador had had ample opportunities for many years to observe the movement of public affairs in this country. We might be prepared to have the ruling caste in Germany, while enjoying the profits of their cartels and other forms of monopolies, loftily prate about the indifference of the American people to anything but money-making, but it is amazing that the German Ambassador, witnessing in this country, as he did, the most extraordinary revolution of modern times in business methods and morals, brought about largely

through the leadership of Mr. Roosevelt, and unquestionably supported by the vast majority of the American people, should with seeming honesty, entertain the view that the Americans cared for nothing but money-getting.

Some of the subjects dealt with in this volume have aroused more or less bitter controversy. If any value attaches to my treatment of them it is because I wrote before discussion had progressed far, and in a more or less impartial way attempted to inform the public concerning subjects which at the time I had, perhaps, studied more than most people. This is particularly so of the papers relating to the League of Nations, the Treaty in the Senate, the Railroads and Bolshevism. The paper on State Control of Navigable Waters was prepared as a result of a litigation relating to a subject of vast importance to the people of the United States, concerning which, however, the public at large is very inadequately informed. This chapter will naturally have an interest largely for professional students of the subject. At some time, however, the people of the country will perceive that the improvement of its waterways and waterpowers has a most vital connection with their personal comfort and their business interests, and they will insist that the relation between public control or supervision and business enterprise seeking to improve the natural resources of the country, shall be adjusted in some workable fashion.

I cannot flatter myself that my views as to the solution of the Railroad problem confronting this country after the war have had much influence. But that may with equal truth be said of the numerous plans proposed to Congress as a basis of legislation, since the views of no single individual or group of individuals,

have alone contributed much to the solution of the difficult and complicated economic and political question which was involved.

There are a number of reforms of our law which ought to be made if its administration is to be kept abreast of the needs of modern civilization. Largely through inertia we permit a system acknowledged to be defective in many respects to remain unreformed. Reiteration of this fact is necessary if an impression upon the public mind is to be made. It is amazing, for instance, that the public who witness in our courts the application every day of some of our artificial, if not ridiculous rules of evidence, do not rise *en masse* and insist that they be changed. And yet they remain indifferent. We are sadly in need of a modern Jeremy Bentham, who, even if he make use of exaggeration and ridicule, would arouse the public to a realization of some of the practices now prevailing, by which the pursuit of truth is embarrassed. This and other reforms are suggested in my annual address to the New York State Bar Association, which was designed to arouse the American lawyer to a realization of the responsibility resting upon him on account of the public function which members of the bar must perform if they would be good American citizens. At the annual dinner of the Association I discussed freedom of speech in this country and the danger confronting us that minorities, and not majorities, should rule.

The paper on Aspects of Bolshevism and Americanism was the result of a summer's study of such original material as could be obtained from all sources concerning the Russian situation, much of which consisted of inflammatory books and literature purchased at the Rand School. Only from such sources did it seem to be possible to become possessed of the Russian situa-

tion from the standpoint of the Marxian Communists, who now go under the name of Bolsheviks.

The paper on the Tobacco Trust decisions resulted from the trial and finally the argument in the Supreme Court of certain questions under the Fourth and Fifth Amendments of the Federal Constitution concerning unlawful searches and the right of an individual to be free from being compelled to incriminate himself. The rule laid down by the Supreme Court in the *Hale* and *McAlister* cases as a result of this litigation, enabled the government to obtain evidence upon which most of the prosecutions under the Anti-Trust Law were ultimately commenced and carried to completion.

I have not thought that any publication that I might make would be complete without some adequate reference to the activities of the bar of this country in contributing to the enforcement of the Selective Service Law during the war. Credit has been accorded to the lawyers of the country in formal communications from government officials. But I do not believe that the members of the legal profession of the entire country have received their due meed of praise for the extent and value of the service they performed in the creation of our army of four millions of men, without unnecessary impairment of the industrial efficiency of the country, or undue disturbance of social and family life. That task was of infinite difficulty. No other nation of the world was ever confronted with such a complicated undertaking. The credit due to General Crowder and the office of the Provost Marshal General for the genius which was displayed in conceiving the plan of the Selective Service Law has never been sufficiently accentuated. The manner in which the law was executed was no less remarkable. And it is equally certain that unless the services of the entire American

bar had been placed at the disposition of the Government in advising registrants concerning their rights and obligations, and in aiding them in the preparation of the complicated questionnaires, through which the system was put into effect, confusion would have ruled from the outset. Both the President and the Provost Marshal General early perceived that an opportunity was afforded to the legal profession as a class to render a highly patriotic service, and they immediately appealed to them to put themselves at the disposition of the governmental officers. This was done promptly and effectively; and it is no more than due to the profession at large that publicity should be again given to the fact.

The chapter on the League of Nations, as well as the contributions to "The Covenanter" printed as a part of this volume, were the result of an early study of the Covenant of the League before the discussion became affected by the extraordinary bitterness with which both advocates and opponents of the League ultimately attempted to buttress their contentions. Vigor of assertion came to assume more importance to some speakers than the soundness of their reasons. Arguments of the most tenuous character were put forth with ill-timed vigor and gross exaggeration. Debaters did not consider whether their objections would ever have any practical importance. The controversy had many points of similarity to the discussion which raged in the state conventions which considered our Federal Constitution in 1788 and 1789.

Objections to our Constitution, asserted by its die-hard opponents to be of the most vital importance, were based upon forebodings as to perils then thought to be certain to ensue; but most of them have never since had any importance except to illustrate how the

bitterness of controversy may stimulate the play of the imagination. In the debate concerning the League of Nations, most fantastic arguments and meticulous criticisms have assumed for the moment substantial importance, and responsible statesmen have not hesitated to indulge in the most extravagant flights of fancy, such, for instance, as that the League of Nations will result in the domination of the world by the colored races, or by the Pope! It is indeed unfortunate that the adoption of a measure of such vast importance to the entire world, should have been imperilled by a degeneration into a bitter argument upon what is largely a matter of form; and the fault in this respect has not been by any means on one side alone. I cannot, of course, attempt here to discuss the merits of the controversy, but I am tempted to advert to a single point. I have always thought that the discussion concerning Article X had assumed an importance far beyond what it deserved. In view of the other articles of the Covenant, that Article is largely a provision for an emergency, and a remote one. It is hardly conceivable, or to put it less strongly, only in a very rare case would it happen, that there would be an external aggression by one country upon the territorial integrity or political independence of another, without some antecedent inciting cause. Now, if such cause existed as a matter in dispute, it must be presumed that under the machinery provided for in Articles XII, XIII, XV and XVI, it would have been submitted to arbitration or mediation, hostilities being withheld in the meantime, and that for a failure to comply with the provisions of those articles the economic boycott provided for in Article XVI would have gone into effect. Only, therefore, in the case of a nation failing to observe the covenants contained in the

Articles referred to, and thus giving to all the other member nations under the provisions of Article XVI a cause of war, can it be supposed that the provision of Article X would come into operation. That Article is necessary for such an exigent situation, but that such a situation will ever arise is extremely improbable. And yet, about the provisions of that Article more than of any other has the controversy raged.

I have included in this collection an appreciation of John L. Cadwalader,—a figure of distinction in the cultural life of New York City. He possessed a unique personality. He was a gentleman of the old school, and yet in his keen perception of recent developments, social, political and professional, he was a modern of moderns. If there be American aristocrats he was one by birth and association, but he had an ill-concealed contempt for those who claimed social or other distinction except for worth.

In epistolary literature Mr. Cadwalader might have rivaled Horace Walpole, with less vitriol; in public life he would have been a great diplomatist, looking at world affairs through an international medium to which wide travel and his experience early in life as Assistant Secretary of State accustomed him. He loved art in its various forms and satisfied his craving by surrounding himself with beautiful things which by his will he gave to the public. But little that he wrote was preserved and he hated the histrionic display of politics; he was content to forego the fame which his talents and his character would have assured him.

In conversation Mr. Cadwalader had a pungent wit and a delicate vein of satire, directed frequently at manners in modern society offending against good taste or sound morals. He was eminent in his profession. In subtlety in giving point to legal docu-

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ments he exceeded any lawyer of my acquaintance. He was a distinguished figure in the city of his residence, and I am glad to give permanent form to an address which was delivered upon the occasion of the presentation to Mr. Cadwalader's native city of Trenton of a building for the public library for which he had made provision before his death.

H. W. T.

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**OCCASIONAL PAPERS AND
ADDRESSES OF AN AMERICAN LAWYER**

I

ADDRESS TO THE HARVARD LAW SCHOOL STUDENTS ¹

GENTLEMEN OF THE HARVARD LAW SCHOOL:

BEFORE passing to the main subject of my address, I wish to make a few observations upon the work of this school and, from the standpoint of a practitioner trained under another system, to point out the good which it and others like it are doing for the profession.

In the United States, almost to the middle of the nineteenth century, methods for the study of law were crude and unscientific. A knowledge of the law was supposed to be picked up in lawyers' offices, with little systematic instruction. The modern American law school has been a development from this haphazard method. The earliest law lectures in this country were delivered by James Wilson at Philadelphia, and the first of the series was listened to by President Washington and all of his cabinet; but they would be found by students of to-day too general to be of practical benefit. The earliest law school of the modern type was the one at Litchfield, Connecticut, which became famous in the early part of the nineteenth century. The Harvard Law School was founded, I believe, in 1817. It did not, however, become a serious institution until 1829, when Story became the Dane professor at law. Other law schools followed, but it was not until thirty years ago that the idea was generally accepted that a thorough, systematic training in a law school was essential to a proper legal education. There are now in existence in this country more than

¹ Delivered in 1908.

one hundred of such schools; and in not less than eighteen states of the Union three years' preparatory work is required for admission to the bar.

When it is considered that the science and history of our jurisprudence have been developing and its literature increasing for hundreds of years, it is clear that its study should be systematic. If the law is to retain its character as a learned profession, it must be studied as a science, its relation to the social fabric must be understood, and its ancient ideals regarded with veneration. You will hear, and it cannot be denied, that a practical knowledge of the law can only be obtained by experience in a law office; but only in an institution dedicated to scientific study and removed from the distractions of active practice can the general principles of our jurisprudence be mastered; and without a sympathetic grasp of these, no man, whatever his gifts, will imbibe the true spirit of the noble science which we profess.

It would be foreign to the main purpose of this address to enter upon a discussion of the admirable system of instruction applied in this school; but I cannot refrain from mentioning one thing which I understand has become a feature. That is the tendency of your professors to give credit to the student not so much for the correctness of his view of any particular proposition, as to the character of his reasons for holding it. This is justified by practical experience. Much of the time of every practicing lawyer is occupied in supporting views which are ultimately declared by the court to be untenable. Why, then, should a student be expected always to be found on the right side? It is true that many general principles of the law are definitely settled; but concrete cases rarely come within these principles, for in the complexity of

human affairs cases identical in their facts seldom occur. It therefore happens that the task of the lawyer and of the judge in most cases is to determine how far the peculiar facts of a given case make a general principle inapplicable and bring it within a modification or an exception. It is not so much that the science of the law is inexact as that human affairs continue to present novel combinations and complications, and the mind is taxed to determine how established principles shall be applied to such new conditions. Dr. Johnson recognized this when he observed that the law was that science in which the greatest powers of understanding were applied to the greatest number of facts.

And so you must not be discouraged if you find yourself reaching wrong conclusions from seemingly sound reasons, for that is what the best lawyers are constantly doing. The advantage that we older lawyers have is that we are better able to live down our errors. It is related that Thurlow, when Lord Chancellor of England, used to say of Loughborough, who also ascended the woolsack: "That damned Scotchman has the gift of gab, but he is no lawyer; in the House of Lords I get Taffy Kenyon, or some one else who does my dirty work, to start some law doctrine in such a way that the fellow must get up to answer it and then I leave the woolsack and give him such a thump in the bread basket that he cannot recover his wind." And yet the same Lord Thurlow, after he left the woolsack, found himself a subject of criticism equally inconsiderate. When chancellor, he had suggested to Lord Eldon that a wooden machine might be invented with which to draw bills and answers in chancery. After he had ceased to be chancellor, a bill was drawn against a friend of his and Thurlow advised him to submit the answer to Eldon, who was then attorney

general. The latter found it so badly drawn that he recommended that he employ some lawyer who understood something about pleading to redraw it. Lord Thurlow subsequently met Lord Eldon and said to him: "So, I understand, you think my friend Mack's answer won't do." "Do?" said he. "My lord, it won't do at all; it must have been drawn by that wooden machine which you formerly told me might be invented to draw bills and answers." "That is very unlucky," says Thurlow, "and impudent, too, if you had known the fact—that I drew the answer myself."

You should seek to cultivate in your studies accuracy of observation, clearness of thought, precision of expression and a knowledge of the main principles of law. These are necessary to the making of a good lawyer, and with industry and patience and experience are bound to bring success. But do not forget that the practice of the law should be more than a mere means of livelihood. In spite of its imperfections, which must exist in any system for the conduct of human affairs, our jurisprudence is probably as perfect a system as that which any civilization has produced; and Burke spoke truly when he said that it did more "to quicken and invigorate the understanding than all the other kinds of learning put together." Every lawyer may do something to preserve and improve the principles and traditions of the law, and particularly to keep them uncorrupted by and lifted above the prevailing commercial spirit of the age. And this leads me to speak of the present influence of the profession in the community.

It has recently, and I fear with some justice, been said that within the last quarter of a century the prestige of the legal profession has declined. If this is true, young men of your generation can address them-

selves to no more lofty purpose than the correction of such an unfortunate situation. The tone of the community itself cannot but suffer if the influence of our profession is impaired. While lawyers must look to the profession for their support, they are no less engaged in the working out of intellectual problems of permanent value to the community and in doing this they have always been actuated by a high sense of honor.

In 1820 Erskine said in the House of Lords:

“The habits of my professional life are, I hope, a useful shield against every power whatsoever. I was bred in my early youth in two professions, the characteristics of each of which is honor; but after an experience of very many years, I can say with truth that they cannot stand higher for honor than the profession of the law. Amidst unexampled temptations which, through human frailty, have produced their victims, the greatest bulk of the members of it are sound; and the cause is obvious—there is something so beautiful and exalted in the faithful administration of justice and departure from it so odious and disgusting that a perpetual monitor is raised up in the mind against the accesses of corruption.”

I believe that the same may be said with no less truth of our profession at the present time; and yet there is too much ground to suppose that a different view is held in the community at large. The impairment of the influence of any of the learned professions cannot but do harm to society. This is especially true of the law, because it comes into closer contact with human affairs in a greater number of ways than any other profession. In private affairs, the destruction of confidence in the lawyers would go very far to affect the individual citizen in his life, liberty and pursuit of happiness; but the most serious injury would be to the

state and to the public service. The integrity of our institutions depends more upon the bar and the bench than upon any other class of citizens; and the public service has always been equipped by persons having a legal education. Two-thirds of our Presidents, two-thirds of our United States senators and more than half of our representatives in the lower house of Congress and our state legislatures have been lawyers; and this is no doubt due to the fact that the experience of a lawyer is a fairly good substitute in our country for the special training for government service in other countries.

In 1830 de Tocqueville thus described the position of lawyers in the United States:

“As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration. They consequently exercise a powerful influence upon the formation of the law and upon its execution. . . .

“The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it. It acts upon the country imperceptibly, but finally fashions it to suit its own purpose.”

This fairly describes the cause and the extent of the former influence of the lawyers in the United States. And why has this situation changed in recent years? I believe that the cause must be sought in conditions created by the educational, social and industrial evolution of the last quarter of a century.

With the spread of liberal education among people engaged in all kinds of business pursuits, the members of the learned professions no longer enjoy distinction on account of their intellectual equipment. The day when a college education was regarded as a disqualification for successful participation in business pursuits has long since passed; and in many fields of activity the lawyer now finds that he no longer enjoys the intellectual supremacy which formerly in part accounted for his position of influence. But unfortunately the better education has not brought to the business man a greater reverence for the spirit of the law. On the contrary, he has been swept along by the march of industrial progress and in the strife for tangible results has become impatient both of the restraints of law and of the lawyers who advise him that the restraints exist. The strenuous effort to construct and acquire has sensibly impaired the Anglo-Saxon reverence for the law because it is the law. The man of thought and ideals has been subordinated to the man of action; and this influence has created a tendency to obliterate the line which should be maintained by lawyers themselves between the business and the professional function. I doubt whether the great lawyers of the past, like Webster, Clay, Binney, Sidney Bartlett and Mason would to-day occupy the commanding position which they enjoyed in their time. We have had perhaps in our day as great lawyers, but their importance as citizens has been dwarfed by the greatness and diversified character of modern intellectual activities and industrial undertakings in which men of other vocations, much more than formerly, have aroused the interest of the general public.

Such men as O'Connor and Carter and Choate and Evarts and Root and Johnson would have ranked in

legal ability and attainments with the greatest lawyers of the nineteenth century, and yet their professional distinction has not given them the same position of influence in the community.

But neither the wider spread of culture and education, nor the increased diversity of intellectual activities, nor the great industrial development of recent years fully accounts for the condition of the profession which we are considering. More specific causes are to be found for which the profession itself is responsible; and it is these to which I wish to direct your particular attention, for with your generation must rest the cure of any evils which they have produced.

Lawyers of to-day come in touch with business matters in a way formerly seldom witnessed. With the recent growth of industrial and commercial enterprise, it happens with too much frequency that lawyers who have attained to a position of prominence and influence have permitted themselves to become financially interested in projects committed to their professional care. They have become directors of corporations for which they are counsel; they have performed the function of promoters; they have increasingly made their compensation dependent upon the success of the business concerning which they advise; they have practically converted their offices into business agencies while holding themselves out to the public as practicing lawyers. Indeed, to such an extent have these things prevailed that many clients, finding lawyers of this kind convenient business coadjutors, are not content to employ a lawyer who confines himself to professional advice and is not resourceful in working out purely business projects. It has been quite a natural transition from this condition that many lawyers have left the ranks of the profession and have become bankers

and railroad and corporate officers, or have engaged in other commercial pursuits. I do not wish to be understood as implying that these facts necessarily indicate anything improper or dishonorable; but I am confident that they disable a lawyer from exercising, according to the best professional ideals, his proper function. A lawyer is not a safe counselor in a matter in which his own financial interest is involved; but far the greater harm results from the confusion created in the mind of the public between the professional and the business function. If members of the bar who habitually engage in directing business undertakings would call themselves promoters or business men and not lawyers, the injury would be minimized. But the tendency is rather to gain for their undertakings the advantage of the respectability and influence which attaches to their character as lawyers. For the greater number of representative lawyers scrupulously draw the line and do not permit themselves to act in the capacity of promoters or business men; and some of the largest and most prosperous law firms in the city where I practice, believing that advice by a lawyer who is financially interested is attended with great risk of mistake, insist that no partner shall be financially interested in any transaction with reference to which he gives professional advice. It is also true that many of the wisest business men differentiate between the business and the professional side of a question and seek a lawyer who will confine himself strictly to advice as to the law. There are, however, many conspicuous exceptions to these salutary rules. Fortunately, lawyers who mix business enterprise with law practice do not hold a commanding position in the profession, but the harm comes from the fact that the same discrimination is not generally exercised by the lay community.

In this connection it is pertinent to say that it has now become a common, if not a universal, custom for railroad companies and great industrial combinations as well, to employ attorneys or counsel upon an annual salary, in return for which they devote themselves exclusively to the business of their clients. While the tendency arising from the devotion of a lawyer to a single interest may be to create a bias, I can give personal testimony of the fact that many salaried counsel of great corporations are men of the highest personal character and legal attainments, and I would not reflect upon them as a class. Nevertheless, it is inevitable that when a lawyer withdraws from general practice he ceases to exert among the members of his profession so great an influence as those who have retained their professional independence; and an attorney in the employ of a corporation, however worthy he may be, is classed by the public not so much as a lawyer as an employee of the corporation, and it results that the penalty for corporate sins is sometimes visited upon him. When it is considered that corporations seek the best available legal talent and that the number of salaried counsel is a very appreciable proportion of the best practicing lawyers, the effect upon the standing of the whole body of lawyers becomes manifest.

I would not be understood as saying that in the great industrial development of the modern day a lawyer who has business aptitude is not a more valuable adviser than one who has only legal ability; for that would not be stating the fact. Such a lawyer can advise a business client more sympathetically, and consequently more usefully, than one who has confined himself strictly to questions of law. Indeed, more than ever before, the correct application of legal principles to the novel problems presented by the great commer-

cial and industrial development of the last twenty-five years is dependent upon some knowledge of the business conditions to which they are to be applied. One virtue of our system of law lies in the flexibility with which it adjusts itself to the development of human affairs, and at no previous time has this been so much called into requisition. If the law is not quick to respond and apply itself to the combinations and complexities of modern industrial and commercial development, it will not adequately perform its most useful function. But it is not necessary that a lawyer should himself become involved in business ventures in order to apply the principles of the law to modern problems; and it would seem just as incongruous as it ever was to see great leaders of the bar like James C. Carter, or Joseph H. Choate, or John G. Johnson acting the part both of legal advisers and of promoters in great business enterprises.

We are next concerned with what is called the corporation lawyer. The term as popularly used has become an opprobrious epithet rather than a well-understood definition; for it would be difficult to find in this country a lawyer of standing who has not advised corporations. When it is considered that ninety per cent. of the business of the country is done by corporations, it will readily appear that a large part of the law business of the country must relate, directly or indirectly, to their affairs. Unfortunately, however, there is too frequently foundation for the charges which have been made as to the abuses and dishonesty of corporate management. Many lawyers have become so identified with the interests of corporations the conduct of which has given rise to such charges and have aided them to such an extent in evading the law or in taking the chances of extremely doubtful interpretations of it,

that there has been justly visited upon the lawyers themselves the same condemnation that corporate misconduct has aroused. It is to such members of our profession that the words "corporation lawyers" in their opprobrious sense should be applied; and it goes without saying that as a class they have brought great discredit upon the profession.

I should not fully cover this part of my subject without mentioning the change in the social position of members of the profession in their respective communities, particularly in the great centers of population. The accumulation of great wealth from sources other than professional incomes enables some lawyers to indulge in the accessories of sumptuous living; and instances of this kind are numerous enough to create an impression in the minds of the public that the habits of the bar as a class are no longer characterized by plain living and high thinking. It is no doubt true that professional incomes of all kinds have greatly increased; but lawyers as a class continue to work hard, live well and die poor. Displays of individual wealth have undoubtedly contributed in some measure to lead the indiscriminating public to group the members of the profession with those whose chief occupation is that of making money; and this impression is accentuated by reckless newspaper statements of professional incomes. Quite recently, for instance, a newspaper article purporting to give notable fees received by distinguished counsel, stated that one of the most noted lawyers in the United States had received for his services in the Income Tax case \$200,000; and I have his own word as authority for the statement that his total fee was \$30,000. This sort of exaggeration is not discountenanced by some lawyers who, without technically violating the professional tradition against

advertisement, do not discourage the appearance of their names in the newspapers in connection with the receipt of fabulous sums. Distinction at the bar is sometimes legitimately enhanced by newspaper comment; but some of the most distinguished members of the profession rarely figure in the newspapers and are little known to the general public. Unfortunately, there are charlatans in our profession, and the modern newspaper affords them ample opportunity to bring their names frequently before an indiscriminating public; and the factitious newspaper reputation of unworthy members of the bar has undoubtedly been one of the causes which have contributed to lessen the influence of the body of its members as a moral and intellectual force in the community. This same class of lawyers also indulge in questionable methods for securing business and much might be said, if time sufficed, upon this as one of the causes which has brought certain classes of lawyers into disrepute. We are all interested to secure business; and while there is perhaps, nothing morally wrong in procuring clients by active solicitation or by public advertisement, it is better that these things should not be done. As Dr. Johnson wisely said, "a man of sensibility would disdain to do them," although he slyly added that he would have a lawyer "inject a little hint now and then to prevent his being overlooked."

These are some of the things which have affected the prestige of our profession. They are no doubt confined to a relatively small portion of the entire membership of the bar. But the profession at large has suffered from the conduct and tone of the minority whose activities are more conspicuous though less creditable.

I have not attempted to deal with another kind of

criticism of the bar because it has been encountered in all ages. It has sprung oftentimes from prejudice and ignorance. Sometimes, however, it has been based upon real abuses or upon the failure of the law to keep pace with the development of civilization. History and literature abound with disparaging criticism of this kind. Even the mother of Hardwicke, the greatest of England's Lord Chancellors, insisted that her son should be apprenticed to an "honest trade" than that of an attorney, although her husband, the chancellor's father, had followed that profession.

The poet Coleridge, in "The Devil's Thoughts," said:

"He saw a lawyer killing a viper
On a dunghill hard by his own stable;
And the devil smiled, for it put him in mind
Of Cain and *his* brother Abel."

In Jarndyce against Jarndyce and Bardell against Pickwick, Dickens leveled his satire at real abuses, and there is much of the same kind of criticism in Warren's "Ten Thousand a Year."

The trust reposed in a lawyer will always subject him to temptations peculiarly difficult to resist, and so long as human nature remains unchanged, individual members of the bar will yield and the bar itself will in some measure suffer. The immense increase in the numbers of the profession in this country and the greater value of the interests entrusted to their care, have brought and will bring to public attention a greater number of flagrant instances where members of the bar have proved unworthy of their trust. But I cannot deal with this condition, as I have intended to confine myself to matters which relate not so much to frailties of individual lawyers, as to the changes in

the profession wrought by the peculiar conditions of social and business life of to-day. I will say, however, that in spite of individual instances of dishonesty, I am confident that the moral tone of the bar as a class has not been lowered. Its members are inspired by the same sense of justice and the same loyalty to their clients as in the past. Indeed, I think the present standards of propriety and morality will compare as favorably as ever with those of other classes in the community and particularly of business men. It still remains the fact that the habit of fidelity to the interests of the client, and the better understanding of the duty imposed by the fiduciary relation, have a more elevating influence upon the character of the lawyer than the habit of the business man of making money for himself alone, without the restraint imposed by a sense of responsibility which usually springs from being entrusted with the interests and the welfare of others.

That a remedy exists for the condition I have mentioned I have no doubt; and it is the rising generation which must bring from the study of the law in such institutions as this a determination to raise our profession above the demoralizing influence of commercialism, and restore it to its former place of honor. The highest ideals of professional conduct are to be absorbed from the study of the classics of the law. It is from such study that you will receive your most lasting inspiration to regard the law as a science and to stand against any idea that its practice can be made a commercial undertaking. But no lawyer should be content to confine his activities to the private practice of his profession. He, more than any other member of the community, owes it to his country to furnish an example of the faithful performance of the duties of

citizenship. He should keep in touch with public life and do his part to keep it on a high level of purity and efficiency, for no one is better equipped for such service. He should participate in all other forms of political activity open to the citizen. And if he holds office, he should remember that the public is his client and that he cannot serve that client in any way so well as by strict adherence to the best traditions of his own profession.

Rufus Choate, in an address delivered before this law school in 1845, said that it had been the office of the American lawyers of his day to interpret, administer and maintain the constitutions of the country and that they had thereby "shared in the dignity of founders of states, of restorers of states, of preservers of states. I said and I repeat that while lawyers, and because we are lawyers, we are statesmen. We are by profession statesmen. And who may measure the value of this department of public duty?"

It may be that it requires to-day more initiative and positive effort to perform the lawyer's duty as a statesman, because we have passed that period where the shaping of our form of government depended so much on the interpretation of the fundamental law. The epoch-making questions of constitutional limitations in the settlement of which the great lawyers of the first century of our government acted also the part of great statesmen, no longer so frequently arise.¹ Until Marshall, as a Justice of the Supreme Court, began his career, the Constitution was no more a living organism than the constitutions of Mexico or of some of the Latin-American republics of South America, whose mere words are equally admirable. An interpretation

¹ See, however, the important questions which have arisen since this address was delivered and which are referred to in my address to the New York State Bar Association, *post*, p. 23.

less statesmanlike than his might have made the clauses of the Constitution little more than futile rhetoric. While it is true that great constitutional questions arise less frequently in the ordinary practice of a lawyer than they did in the first half century of our history, it is also true that novel social and industrial developments are bringing to our attention new questions of constitutional law, and many clauses of the Constitution are being resorted to which have never before received judicial interpretation. The Supreme Court has decided the manner in which the limitations of the Constitution shall be imposed and a great body of constitutional precedents aids in the solution of new questions. And so, although a multitude of other matters occupies the attention of the practicing lawyer, just as great, just as novel and just as difficult questions of constitutional law are pressing for solution, and the welfare of the country is just as much dependent upon the manner in which they are solved, as in the day of Rufus Choate. No inspiration can be greater for a lawyer than to address himself to the solution of such questions, not with the narrow perspective of a technical lawyer bound down by his subtleties and quiddities, but by the broad view of an American lawyer acting in his noblest rôle of a constructive statesman.

It may be thought that I have been setting a standard which no one can reach and make a living. I do not think so. But even if I have, it is well to reflect upon these things and to establish early in your career correct ideals. Your task will then be easier and you will not readily yield to the temptations which now more than ever before beset the practice of the law. In spite of the intense practicability of the age, it is still possible that there shall be to-day the perfect lawyer, of whom it may, in the words of a quaint writer of the

seventeenth century, he said: "While he lives, he is the delight of the courts, the ornament of the bar, the glory of his profession, the terror of deceit, the oracle of his country; and when death shall call him to the bar of Heaven by a *habeas corpus*, he will find his Judge his advocate; nonsuit the Evil One, obtain a liberate from all his infirmities and continue still one of the long robe in glory."

Such lawyers still exist. Moreover, it is only from such as they that the bar chooses its real leaders. And so long as the profession itself thus continues to recognize and apply the true tests for professional distinction, we need not be discouraged if extrinsic causes have temporarily lessened its influence in the community.

**SOME RESPONSIBILITIES OF THE
AMERICAN LAWYER**

II

SOME RESPONSIBILITIES OF THE AMERICAN LAWYER ¹

PROCEDURE, remedies and court organizations outlive their usefulness after periods of fairly uniform duration. The need for correcting the methods of administering the law is constantly recurring. While we may view with caution proposals to make radical changes in the common law, and in the equally revered, if less ancient, principles embodied in our Constitution, we should never shrink from a candid inquiry as to whether the administration of justice is too technical or too costly or too tardy, and whether its methods are so at variance with our national habits and thought as to obscure the beneficent principles of our system of law.

It is especially fitting at the present time to make such an inquiry.

The war and its distressing after-effects are bringing the world face to face with real values in life, particularly in the realm of the intellectual and the spiritual; and this will lead to a scrutiny of existing institutions more searching than in normal times.

SIMPLIFICATION OF PROCEDURE

The reasonable limits of this address do not permit me to enter upon a discussion of the comparative merits of the pending projects for simplifying our court procedure. But I am persuaded that there

¹ President's address, delivered before the New York State Bar Association, at its annual meeting, held in New York city January 16-17, 1920.

should be no further delay in arriving at an agreement upon some plan. A radical simplification is one of the crying needs of the times. The public cares little about whether there is to be a short code supplemented by rules of court, or a longer code affording greater flexibility to respond to changing needs. Differences concerning such matters will continue to exist, and it cannot be expected that any reform will ever receive unanimous approval.

We lawyers speak of the division of the body of our law into the substantive, the adjective, the procedural and the remedial. But such terms have no significance to the general public. If our methods of procedure are uncertain and complicated, and cause delay, or if our rules of evidence and the manner in which we conduct our trials are ill adapted to bringing out the truth, or if existing remedies fail of their purpose, it will do little good for us to glorify our substantive law. The lay public cares little about the theoretical perfection of the principles of our jurisprudence; and if the machinery for their application to concrete cases is so imperfect that they cannot be readily invoked, condemnation will extend to our entire judicial system.

The fact that the time for a reëxamination of our procedure has arrived ought not to be a source of discouragement. In the practice of a profession like ours, the ingenuity of the lawyer frequently directs itself to procedural technicalities. They afford opportunities for tactical advantage, and that is a part of the game. We do not stop in the heat of contest to inquire whither a repetition of such practices may lead, and gradually, under any system, procedure may become the complicated, mysterious and subtle means by which fundamental principles are obscured, and the vindication of the rights of the individual retarded or

defeated. Partly on account of this natural tendency and partly on account of changed conditions of life, it had been found necessary every thirty or forty years to consolidate procedural statutes, simplify their language and supply defects and omissions. And we have now got into a condition where an even more radical reform is necessary.

THE LAW OF EVIDENCE

There has been a tendency in this country to regard the rules of evidence as a branch of substantive law, or at least as of equal importance. We have been far too inert in subjecting them to a scientific revision. While changes have been made by statute from time to time, the law of evidence has rarely, if ever, been made the subject of comprehensive reëxamination. Restrictions upon a free investigation of facts have been retained which, under modern conditions, are frequently impeding, rather than facilitating, the ascertainment of truth. Many of these restrictions are rightfully regarded by litigants, juries and the public as interposing obstacles which wise and cautious men do not consider necessary in making investigations on which they base important action.

We must, of course, have rules of evidence. But it is also true that much of the modern law of evidence is a matter of recent development. As a system, it is scarcely two centuries old. Edmund Burke upon the trial of Warren Hastings is said to have protested his ignorance of the law of evidence, and to have said it could be comprised in so small a compass that a parrot he had known might get the rules by rote in one-half hour, and repeat them in five minutes.

The effort of our law is to base rules of evidence upon sound reason. But a change in the business

habits, in the social customs, in the moral tendencies and even in national or state prejudices, makes the reasons of yesterday the bare subtleties and the seeming caprice of to-day.

Any lawyer observant of the effect produced by our trial procedure upon lay witnesses, spectators and jurors, must have noted their dissatisfaction, more or less articulate, with our rules of evidence, and their tendency to regard them not only as highly artificial, but also as rather mysterious and subtle obstacles to a full investigation of facts. While such impressions on the lay mind should not lead us to abandon rules based upon sound reason, neither should any fancied sanctity attaching to the law of evidence on account of its antiquity prevent us from subjecting it from time to time to a reëxamination, for the purpose of determining whether it continues to perform the function for which it is designed. We should rather be guided by the kind of common sense which led Lord Chief Justice Cockburn to say: "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence and discuss its weight." (*R. v. Birmingham*, 1 B. & S. 763.) Under the influence of such considerations, rules of evidence are applied in England with far less rigidity than in this country. And we may well consider whether we ought not here to vest in our trial judges a wider discretion, not subject to review, under which there may be a greater liberality in such matters as *res gestae*, and hearsay and secondary evidence.

That the subject needs reiteration is evident from the disregard of such a warning as that of Mr. Root to the members of the American Bar Association in 1915, when he said:

“Our trial practice in the admission and exclusion of evidence does not agree with the common sense, the experience, or the instincts of any intelligent layman in the country. . . . How common it is to see an unsophisticated witness on the stand trying to tell a true story about some event with which he is familiar and continually stopped and bewildered by objections based upon distinctions which do not exist in his mind at all, and finally leaving the stand with a feeling that he has been bottled up and not allowed to tell the truth. We apply these same rules with the same rigidity to women, whose minds work in an entirely different way from the mind of any lawyer who ever had anything to do with devising or developing the rules of evidence. It is an exceedingly difficult thing to tell the truth, the whole truth, and nothing but the truth, on the witness stand, as any lawyer who has been a witness must realize; and the simplest and best way to get that done is to come as near as possible to allowing people to tell their stories their own way.”

Space will not permit me to mention many of the anomalies of our present rules of evidence. Two instances will suffice as illustrations:

Formerly, the disqualification of a witness on account of interest excluded much pertinent testimony. Almost all such restrictions have now been abolished. One, however, is retained in this state by Section 829 of the Code, which excludes the testimony of a person interested in the event of a suit concerning a personal transaction with a deceased person through whose estate he may obtain an advantage. This restriction frequently works intolerable hardship upon honest litigants. The strictest interpretation has been placed upon the rule and it has been the subject of a bewildering labyrinth of decisions. The courts have gone to the extreme of subtlety in applying what they conceive to be its spirit. But the question of the wisdom of the

rule has received little attention. Its existence rests solely upon the assumption that our process of investigating truth upon the trial of the case is inadequate to overcome the danger of fraud and perjury; and that assumption I believe to be without warrant. For if cross-examination does not uncover an attempt at falsification the mere existence of interest will subject the testimony of a witness to the closest scrutiny by court and jury, while the network of circumstances that a trial always discloses will go far to remove the danger guarded against.

Another part of our procedure which needs thoroughgoing reform is that governing the testimony of medical experts. Juries are inclined to pay little heed to such evidence, however eminent or however numerous the experts may be. They generally seek, as indeed do both counsel and courts, to arrive at their conclusions from other proof. Their conclusions are based, not so much upon the refinements of the medical science as upon common sense applied under the instructions of the court to proof of objective circumstances. Lengthy hypothetical questions, with their assumptions of fact based on disputed testimony, present an aspect of artificiality and frequently afford nothing but amusement to jurymen. An effort to understand such questions and to analyze the prepared answers would throw an ordinary jury into confusion; and courts themselves repeatedly testify to their low estimate of evidence thus elicited.

Largely on account of the condition of our law of evidence, trials have become burdened and delayed by objections and exceptions and arguments, for which it would be idle to attempt to place the responsibility either upon the counsel or the courts. Records on appeal have become more and more voluminous and the

cost of litigation has been unnecessarily increased. Where a trial is presided over by an experienced judge and tried by competent counsel, less than half a dozen exceptions to rulings upon evidence ought ordinarily to save every point that would afford a reasonable basis for reversal by a higher court. We can therefore appreciate the irony of the presiding justice of an appellate court in this state when recently he asked counsel for the appellant how it happened that the exceptions on which he relied numbered only 299 instead of 300.

JUSTICE AND THE POOR

Cheap and speedy administration of the law by minor courts in the large cities has become increasingly difficult on account of their crowded population. A recent investigation by the Carnegie Foundation for the Advancement of Teaching has disclosed that while our substantive law is "a remarkably satisfactory human achievement," and while it continues to be "democratic to the core," there has grown up a "wide disparity between the ability of the richer and poorer classes to utilize" its machinery. This has not resulted from neglect of legislatures to pass adequate laws, or through bias or favor of the courts, or through corruption; nor is it attributable to any neglect or deficiency of the bar. It has been produced almost entirely by the extraordinary increase within a comparatively brief period of our urban population through immigration. The investigation of the Carnegie Foundation was made by a member of the Boston bar. His report contains much useful material. But certain generalizations and a few striking, though hardly typical, instances of delay and expense in the courts have unfortunately furnished material which is being used by radicals to aid them in their attacks upon our institu-

tions, and has evoked from the sensational press unfavorable comments unjustified by the facts set forth in the report. For an analysis of its contents shows that through the instrumentality of small claims courts, of conciliation courts and conciliation in general, of arbitration and other such instrumentalities, of domestic relations courts, of administrative tribunals and officials, of defenders in criminal cases, and of legal aid organizations, there has been substantial progress in eliminating both delay and excessive cost in the prosecution of claims for wages, for personal injuries, for small debts such as for rent, groceries and loans, or those arising out of chattel mortgages and assignments of wages, and in the settlement of domestic difficulties of all kinds.

The improvement indicated in all of these matters, instead of giving ground for criticism, affords gratifying evidence of the capacity of the American people for correcting deficiencies in their governmental institutions.

HOMICIDE AND ITS PUNISHMENT

Passing from the subject of the protection of the rights of the individual, I invite your attention to a matter affecting public order. I refer to the alarming increase of the crime of homicide and the small percentage of the convictions for its commission. Although specialists and publicists have commented on this situation, public opinion has remained indifferent.

Figures compiled by Frederick L. Hoffman, Vice-President and Statistician of the Prudential Insurance Company of America, show startling results as to homicides. (Homicide Record of American Cities for 1914, *The Spectator*, December 23, 1915.) In thirty of the larger cities of the country, during ten years from

1895 to 1904, there were 5,927 homicides; that is, at a rate of 5 to each 100,000 of the population, and in the succeeding ten years ending with 1914 the number had increased to 12,742, or at a rate of 8.1 per 100,000. During the same period, for 100 homicides in this country, there were 13 in England and Wales, 30 in Australia, 31 in Prussia, and 56 in Italy. After making allowance for errors, due to varying methods of death registration, death certification, etc., there still remains a startling contrast between this country and other countries in the matter of the crime of homicide. Since 1914, the homicides in this country have been slightly in excess of the average for the preceding ten-year period.

Mr. Moorfield Storey, speaking on the reform of legal procedure, and quoting President Andrew D. White, says:

“The murder rate in the United States is from ten to twenty times greater than the murder rate of the British Empire and other Northwestern European countries.”

And what is the record for the punishment of the crime of homicide?

Records published by the *Chicago Tribune* at the end of each year show that between 1884 and 1908, there had been 131,951 homicides and 2,286 executions. In 1885, the number of homicides had been 1,808 and the executions 108, while in 1904, although the homicides had increased almost fourfold to 8,482, the executions had remained almost stationary, at 116.

The following table shows the homicides and executions for the years from 1912 to 1918, both inclusive:

<i>Year</i>	<i>Homicides</i>	<i>Executions</i>
1912.....	9,152	145
1913.....	8,902	88

<i>Year</i>	<i>Homicides</i>	<i>Executions</i>
1914.....	8,251	74
1915.....	9,230	119
1916.....	9,850	106
1917.....	9,180	70
1918.....	8,850	71

The comparison of these figures with the official figures in England and Canada shows a startling contrast.

In 1913, in England and Wales, 314 persons were tried for murder and homicides, and there were 91 convictions. In 1914, 117 persons were brought to trial for manslaughter, and 48 were convicted. In Canada, in 1913, of 55 persons charged with murder 23 were convicted, and in 1914, of 62 persons charged with the same offense 27 were convicted.

Even making due allowance for imperfect records, varying classifications of the degree of the crime and differing methods of keeping records, the figures show what is measurably near a scandalous condition in the administration of criminal justice.

SUGGESTED REMEDIES

Individual effort in making an investigation of the facts, or in suggesting remedies, cannot amount to much. Without adequate judicial statistics, there can be no thorough and scientific consideration of the subject, no certainty as to the extent of our deficiencies, and no intelligent judgment as to their cause; and only by results disclosed by such statistics will comparisons be possible which will tend to arouse public opinion to greater effort in those communities showing bad comparative results.

THE SELECTION OF JURIES

No process in the administration of criminal justice in this country can be more justly condemned than the selection of jurors in criminal cases. In this state the courts are not free from just criticism for the strictness with which they have interpreted the law upon the subject, nor can the legislature be acquitted of responsibility for failing to change the prevailing practice, which ought not to be tolerated in any civilized community. The highest court of the state could probably ameliorate the situation by not adhering too closely to a technical interpretation of the law. Even under existing rulings, an experienced, competent, forceful and courageous trial judge may do much to prevent such exhibitions as we sometimes have. But if relief cannot be thus obtained, some other way should be found to reform a procedure which in this city tolerated for three weeks the tedious process of selecting a jury to try Harry Thaw, and lent itself in Chicago to the still worse scandal of permitting a delay of three months in the selection of a jury to try Cornelius Shea, after more than six thousand citizens had been examined as to their qualifications.

THE FUNCTION OF THE TRIAL JUDGE

A more decisive participation by the judge in directing the thoughts of the trial jurors would undoubtedly be advantageous in criminal as well as in civil trials. In most jurisdictions in this country a judge must adopt an almost timorous attitude. If he incautiously betrays his opinion upon any disputed question of fact, he is in danger of committing reversible error.

Too rigorous restrictions reduce the judge to the role of a mere moderator, and greatly impair his use-

fulness; and the charge pronounced by counsel on both sides as impartial, too frequently presents itself to the jury as an entirely colorless essay upon an erudite and little understood subject. But juries need more assistance than is afforded by the more or less conventional formulation in technical language of rules of law by which they are to be governed. Why not permit a judge to state his own opinion as to facts, as is frequently done in English courts? The principal reason urged against this is the apprehension, which experience in England and in some jurisdictions in this country shows to be groundless, that the customary warning to the jury that they are not to permit the judge's opinion of the facts to weigh against their own judgment, will, through some fancied influence of the judicial office, be disregarded. The reason does little credit to the character and intelligence of the American jurymen, and, carried a little further through the paths of logic, would lead to the abolition of the jury system itself.

Jurors are human. The consciousness that they constitute an independent agency in the judicial system will be far more likely to make them resent encroachment upon their prerogatives than to lead them complaisantly to yield to undue judicial suggestion. We all know how frequently a charge framed to conform to the rules of law, but designed to favor one side or the other, miscarries, to the chagrin of an over-officious judge; and in England, the danger that the perversity of a jury may defeat the ends of justice constantly deters judges from a too great indulgence in the expression of their opinion on the facts.

THE AMERICAN LAWYER AS A CITIZEN

The American lawyer has a responsibility quite different from his colleagues at the bar of other countries. This difference springs from the peculiar character of our judiciary department as an independent organ of government, whose decisions, though not based on political considerations, vitally affect political measures. In no other country in the world—certainly not in the older ones—does the judiciary perform a function comparable to this in its far-reaching effect upon the stability and development of the institutions of government. Even in England, the constitutionality of an act of the Imperial Parliament may not be questioned by the courts, and the dogma of the inviolability of contracts, which has come to be such an important part of our system of jurisprudence, does not exist. The safeguarding of the political structure of the English Government is not a judicial function, and its courts are rarely called upon to restrain the governmental activities of the outlying units of the Empire. By the provisions of the Federal Constitution, however, a great charter of individual rights has been erected, enforceable in the courts, which protects the individual against the undue exercise of legislative or executive power.

The possession of such extraordinary judicial power has elevated our courts into a most important agency to prevent the impulsive assertion by the people of political power. While the imagination of the framers of our Constitution probably did not picture the extent to which the character and permanence of our government was to become dependent upon interpretations by the Supreme Court during the term of Chief Justice Marshall, and while the people of the United States

could have had little conception when they adopted the Fourteenth Amendment that it would be resorted to, as it has, for the protection of individual and corporate property rights and personal privileges and immunities, there has, nevertheless, in spite of periodical but futile protests of certain schools of publicists, been general acquiescence in the performance by the judiciary of the function which it has assumed; and the acceptance by the people of the judicial power as an instrumentality for maintaining the equilibrium of our Federal system is one of the most significant evidences of the genius of the American people for government.

The part played by the courts in the development of our political history has been very happily expressed by President Hadley in the following words:

“But I think that most intelligent men who know the history of the country will say that our courts have been the real bulwarks of American liberty; and that while Hamilton and his associates would be somewhat disappointed in the working of the machinery of legislation and administration, if they could see it in its present shape, they would be filled with admiration at the work which has been accomplished by the judiciary. I believe it to be the judgment of sober-minded men that the courts have furnished the agency which has guarded us against partisan excesses, and have saved the American Republic from the necessity of repeating the successive revolutionary experiences which France underwent before she could attain to stable democracy. . . .”

No foreign observer has commented upon the workings of our government with so much penetration as James Bryce in “The American Commonwealth”; and upon the powers of the federal judiciary, he says:

“If they had been left to be settled by Congress itself, an interested party, or by any dealings between Congress and

the state legislatures, the dangers of a conflict would have been extreme, and instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying not the judges, but the people who enacted the Constitution."

ATTACKS ON THE JUDICIARY

This peculiar judicial power and the unique body of jurisprudence which has been built upon it are constantly inviting attacks when they impede the speedy solution of pressing and important questions, and particularly those relating to economic and industrial matters. These attacks are symptomatic of the human tendency to resist measures designed to restrain freedom of individual action. A few years ago they took form in the proposed Recall of Judges and Recall of Decisions; and more recently there has been a recrudescence of the same idea in the formal advocacy by the most powerful labor organization in this country of the abolition of the power of the courts to declare acts of Congress void. About a month ago representatives of 119 national and international unions, including the four railroad brotherhoods, summoned to meet by the President of the American Federation of Labor, issued a so-called Bill of Rights, in which, among other attacks upon the courts, they said:

"We assert that there cannot be found in the Constitution of the United States or in the discussions of the Congress which drafted the Constitution any authority for the Federal courts of our country to declare unconstitutional any act passed by Congress. We call upon the people of our country to demand that the Congress of the United States shall take

action for the purpose of preventing the Federal courts from continuing the usurpation of such authority."

THE HISTORICAL ARGUMENT

The historical reference in the above extract is inaccurate. The convention which drafted the Constitution was aware that from the division of power among the three departments of government it resulted that, if Congress should pass acts in violation of the limitations of the Constitution, the Supreme Court would have the power to declare them void. Indeed, Madison, to whom more than to any other member of the Convention is to be assigned the credit for framing the Constitution, went so far as to seek to have the Supreme Court share with the President the veto power ultimately vested in the Executive alone. In the debate which the proposal evoked Gouverneur Morris said that the court should not "be bound to say that a direct violation of the Constitution was law"; and he continued: "A control over the legislature might have its inconveniences; but view the danger on the other side. The most virtuous citizens will often, as members of a legislative body, concur in measures which afterwards, in their private capacity, they will be ashamed of. Encroachment of the popular branch of the government ought to be guarded against."

When the Constitution in 1788 came before the Virginia Convention for ratification, Madison, speaking of the judiciary power, said: "It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coördinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. . . . With respect to the laws of the Union, it is so necessary and



expedient that the judicial power should correspond with the legislative, that it has not been objected to." And he says in another connection that "their laws (i.e. of Congress) in opposition to the Constitution would be void. . . . The Federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void."

John Marshall in the same Convention, anticipating the long line of decisions made by him many years afterward as Chief Justice, speaking of the power of the federal government to make laws said: "Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

THE FUNCTION OF THE FEDERAL JUDICIARY

I but repeat arguments which have become classic, when I say that the interpretation of written law, and *a fortiori* of a written constitution, is a judicial function. It calls for the critical faculty to determine the intention of the law-makers from the instrument itself. Both Hamilton, in the *Federalist*, and Marshall, in *Marbury v. Madison*, agreed in the cogent statement that where two acts of the people were presented, one the Constitution and one a legislative act, the court must either decide "conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law—the court must determine which of these conflicting rules governs the case." And the logic of that position remains conclusive to-day. It merely amounts to this: that the intention of the people as expressed in the fundamental law is to

be enforced rather than the intention of a Congress elected to enact current legislation during its two years of office. Hamilton adds that if the legislature should make bad laws, "the same spirit which had operated in making them would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges."

Even the most extreme opponents of the federal judiciary system have never seriously contended that the power of the Supreme Court to declare state laws void, as contravening the Constitution, was not necessary for the preservation of the Union. For the exercise of that power the Constitution created a tribunal differing from any theretofore existing, whose powers, though judicially exercised, were to extend to matters which were political in that they would necessarily involve claims by the several states that their acts were within the sovereign powers reserved to them. The question whether an act of Congress encroaches upon such sovereign powers involves precisely the same kind of a political question, for, from the standpoint of maintaining the Union in accordance with the constitutional compact, it is just as important to restrain Congress from encroaching upon the powers reserved to the states as it is to keep the states from exercising any of the enumerated powers granted to the federal legislature. It was necessary to provide, because it was an affirmative grant of power affecting the sovereignty of the states, that the "judges in every state" should be bound by the Constitution and laws of the United States, "anything in the Constitution or laws of any state to the contrary notwithstanding" (Art. 6, sec. 2); but it was not necessary to make express provision

with reference to the acts of Congress, for the power of the court was clearly implied by the provision that the Constitution was to be the "supreme law of the land" and the judicial power was to extend "to all cases . . . arising under this Constitution" and the laws of the United States.

It has been frequently pointed out by those criticizing our present system that under the English system the Imperial Parliament is the sole judge of the constitutionality of its legislative acts. But the government of Great Britain presents no questions of the conflicting sovereignty of its several units. Moreover, the British Constitution is a document having its sanction solely in measures enacted by Parliament itself. There is no other instrumentality through which the people can express themselves. If they have the power to make the Constitution, they also have the power in Parliament to unmake it by interpretation or otherwise. But Parliament does not exercise any such power by overruling in a particular case a judicial decision, however much it may change the Constitution in its application to future cases. The proposition of the labor organizations, however, is that Congress shall have the judicial power to reverse the decision of the Supreme Court in a particular case, with no appeal from the decision, however erroneous as a matter of law it may be.

Ours was the first written Constitution attempting to limit the powers of the several organs of a federal system of government, and of the sovereign units of the confederation. The powers enumerated as vested in Congress were far from converting the system into a consolidated, centralized government. They principally related to matters necessary to confer sovereign powers so far as other nations were concerned,

and those in respect of which uniformity of administration was deemed necessary for national coherence. All powers granted to Congress were, of course, in derogation of the sovereign powers of the states. Thus questions of the constitutionality not only of state laws but also of federal laws involve a conflict between state and federal sovereignties. If to Congress had been committed the power to determine the constitutionality of its own acts, it could by a judicial act deprive a state of its reserved sovereign power and gradually completely consolidate the federal government. Such a possibility was perceived to open up a grave menace and the necessity for having an impartial judicial body to remove it became so manifest that, in spite of the multitude of other objections urged to the Constitution, there was no serious objection made to that.

The attitude of the Federation of Labor is probably due to dissatisfaction with such decisions as that in the Child Labor case. But however unsound such decisions may have been, no menace to our institutions has resulted or can result; for the court is powerless to enforce its decrees against the opposition of the executive and legislative departments, and the genius of the American people can always find some way for accomplishing its will within the bounds of legality. If the recent effort of Congress through the taxing power has failed to accomplish the beneficent purpose of the Child Labor Law, there will remain the expedient of amending the Constitution; and the power to resort to that remedy is a complete answer to all objections to the power of the Supreme Court to declare acts of Congress void.

The Supreme Court has nullified few important acts of Congress. There has never been an habitual or

flagrant abuse of power. But there is little doubt that the existence of the power and its occasional exercise have had a very salutary effect in maintaining the balance among the federal departments, and between the state and federal governments, thus giving stability to the entire governmental system. For over 130 years, the government has existed without revolutionary or even radical changes in its constitutional form. It has withstood the strain of foreign wars and one Civil War of the most devastating character. The states have increased from thirteen to forty-eight and their population from three millions to one hundred millions, and the government has had to extend the field for the exercise of its powers over a vastly increased domain and a constantly broadening field of activities. Yet the federal system remains more stable than ever before, and the rights of the individual, whether he be of the majority or of the minority, continue to be effectively safeguarded. History does not record an instance of such stability in any other popular government, certainly not in modern times. And among the chief reasons for this is the fact that the people have been willing to impose upon themselves, through the judiciary, checks against the usurpation of powers withheld under the Constitution.

The burden rests heavily on those who would disturb institutions which have thus by time and experience proved their value. Especially must they show why it is not wiser to make fundamental changes by amending the Constitution itself. Let them tell the country why they are unwilling to submit their case to the deliberate judgment of the people. The amendment of the Constitution is not a complicated process, as was demonstrated in the amendment which validated the income tax; nor does it involve delay disproportion-

ate to the importance that should be attached to such a fundamental step. And if there be a grievance growing out of a decision of the Supreme Court, that is the way to correct it, rather than to overthrow the authority of a court whose decisions have been generally regarded with such respect for their fairness and wisdom that it ranks as one of the greatest judicial tribunals in history.

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THE DUTY OF THE AMERICAN LAWYER

Many other fundamental questions press upon our country, and we lawyers should not be overapprehensive lest in giving organized expression to considered views upon them we shall incur danger of partisan controversy. It is as true now as it was when in 1830 de Tocqueville said that "scarcely any question arises in the United States which does not become sooner or later a subject of judicial debate." If that be so, no part of the community can more fitly engage in controversies involving fundamental questions of government than lawyers. And if associations of the bar refrain from the discussion of questions which permanently affect the safeguards of our Constitution, because they fear to excite partisan controversy, we may well consider whether it is not time to reconstitute them upon some other basis.

It has never before been so necessary for lawyers to think in terms of statesmanship and to stimulate similar habits of thought in others. In adjusting itself to peace conditions, the country will, as it never has before, concern itself with international relations, and it must at the same time continue to guard at home against any impairment of the liberty of the individual, and of the rights of the minority. The relations be-

tween the government and the transportation companies must be adjusted; the entire subject of combinations in restraint of trade must be reconsidered; a fiscal policy adapted to the enormous financial burden cast upon us by the war must be adopted; the rights of labor and those of capital must be brought into stable equilibrium; our institutions must be guarded against the menace of the most modern form of communism; and the authority of our courts must be preserved against the invasion of novel and destructive theories, particularly those which seek to impair the steadying influence of the judiciary. We must solve the questions of international law which will become incident to the provisions of any peace treaty that may be made. And we cannot abate our vigilance in seeing to it that fundamental rights are not submerged by great combinations of capital, and that, on the other hand, no class in the community, however powerful, shall set at naught the rights and convenience of the general public, or unduly interfere with its pursuit of happiness.

None of these great questions can be solved without constant reference to vital principles of constitutional law. Lawyers and associations of the bar better than any other class in the community can contribute to their solution; and that fact carries with it a corresponding duty. President Wilson, then Governor of New Jersey, in an address to the Kentucky Bar Association in 1911, used these words:

“For the notable, I had almost said fundamental, circumstance of our political life is that our courts are, under our constitutional system, the means of our political development. Every change in our law, every modification of political practice, must sooner or later pass under their scrutiny. We can go only as fast as the legal habit of mind of our lawyers will permit. Our politics are bound up in the mental char-

acter and attitude and in the intellectual vigor and vision of our lawyers. Ours is so intensely and characteristically a legal polity that our politics depend upon our lawyers. They are the ultimate instruments of our life."

Just seventy-five years ago, Rufus Choate, in an address delivered to the Harvard Law School, expressed the same idea, saying that it had been the office of the American lawyer of his day to interpret, administer and maintain the constitutions of the country, and that they had thereby, "shared in the dignity of founders of states, of restorers of states, of preservers of states. I said and I repeat that while lawyers, and because we are lawyers, we are statesmen. We are by profession statesmen. And who may measure the value of this department of public duty?"

While James Bryce has made a similar observation, he has also pointed out the fact, which it would be futile to deny, that while the influence of lawyers still remains potent in legislative bodies and in public office, "taking a general survey of the facts of to-day as compared with those of sixty years ago, it is clear that the bar counts for less as a guiding and restraining power tempering the crudity or haste of democracy by its attachment to rule and precedent than it did then."

With the more general diffusion of opportunities for education and the increase of professional and commercial specialization, members of the legal profession no longer enjoy to an extent as great as they did formerly, intellectual and social leadership. The prestige of lawyers (and the same may be said of other professions) has suffered in influence through the increasing importance of the gigantic commercial and financial undertakings of to-day, whose originators and managers must necessarily possess qualities, intellectual and otherwise, which equip them for leadership.

Practical developments in science and the arts have so contributed to the comfort, convenience and health of mankind, that the chief actors in these fields have deservedly occupied positions of wide influence.

With the concentration of wealth in great enterprises, the lawyer has frequently become attached to particular business interests, by which his opinions in relation to great questions of the day are affected and his freedom in the performance of his duties as a citizen more or less fettered. Living in the atmosphere of private interests, such a lawyer finds it increasingly difficult to move out of the narrow channel in which his employment confines him. It results that the exhibition of courage, initiative and constructive leadership is by no means so easy or natural for some of the most competent members of the bar as under the simpler social and industrial conditions existing seventy-five years ago. And yet now more even than then the social, industrial and political questions before the people are intertwined with questions of constitutional or international or municipal law. While the bar must always continue to be the great conservative force in our system, we lawyers should not hesitate to ask ourselves from time to time whether we have not become too conservative; that is, whether the forces of progress have not created such a transformation in the body politic as to require us to become more aggressive if we would play the part for which our training and our experience has fitted us.

RESPECT FOR THE LAW

The crowning service of the American lawyer is to teach respect for the law because it is the law. Some student of our institutions has said that the American people have a talent for legality; that is, for adjusting

themselves to the law as it is and not as it ought to be. We Americans, in the words of Tennyson, have

“Some reverence for the laws ourselves have made;
Some patient force to change them when we will;
Some civic manhood, firm against the crowd.”

The possession of the spirit speaking in these lines has no doubt saved the American people at critical junctures. It is not that we withhold our protest against the policy, and perhaps against the wisdom and justice, of existing laws, for more frequently and more freely than most peoples of the world we denounce them and seek their repeal. But we are attached to the idea that in the long run order will be better preserved, a larger measure of justice will prevail, and the stability of our institutions will more certainly be perpetuated, if we accustom ourselves to accept for the time being the existing law as our guiding force. It is this genius of the American people which has enabled them to accept as a rule of action a constitution which was itself a compromise, and which has worked only through accommodations suggested by the common sense of the people. We may with some pride of race compare this experience with that of the South and Central American republics, and even of France, which have from time to time adopted constitutions, sometimes on the model of ours and no less perfect in form, but which in many cases have proved to be little more than an exhibition of the imitative faculty or an expression of lofty aspiration. With knowledge and experience in self-government, however, the American people have known that no system could be devised which would be perfect to meet every exigency, and they have realized that laws, and even constitutions, must be made to bend to meet practical

situations; but they have also known that if they did not give a certain deferential adherence to the law because it is the law, they would encounter risks, the effect of which could not be predicted. They have believed that a part of the self-restraint required for the successful working of a democratic form of government was to obey an unfit law so long as it was the law, to demonstrate its unfitness by its enforcement, and then to repeal it.

We are now witnessing a protest on the part of many people who assert that the prohibition amendment is not the expression of the will of the people. But whether they be right or not, the American habit of respecting the law will ultimately prevail.

I am not unmindful of some of the great crises of our history, where there have been fundamental differences concerning vital questions, such, for instance, as those which arose in connection with slavery. No greater strain could have been placed upon the patriotism of any citizen than that which weighed upon Abraham Lincoln when the Supreme Court decided the Dred Scott case. With all the fervor of his moral nature he condemned the principle underlying the law, if it was as the Supreme Court interpreted it to be. With all the force of his intellectual nature he believed it to be an unsound interpretation of the Constitution. So far as he was at liberty to disregard it as a political rule, he adopted every proper method to see to it that it should be corrected. But he never denied the binding effect of the decision. He met it by asserting that new views of the question should be presented to the Supreme Court, in order that that tribunal might be induced to put a different interpretation upon the Constitution, or he urged that the Constitution be amended, saying that by so doing "I disturb no rights of prop-

erty; create no disorder; excite no mobs." And he added:

"We believe . . . in obedience to and respect for the judicial department of the government. We think its decisions on constitutional questions when fully settled should control not only the particular cases decided but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution."

**THE BAR IN THE WAR—ITS WAR COMMIT-
TEES AND ITS PARTICIPATION IN THE
ENFORCEMENT OF THE SELECTIVE SER-
VICE LAW AND REGULATIONS**



III

THE BAR IN THE WAR—ITS WAR COMMITTEES AND ITS PARTICIPATION IN THE ENFORCEMENT OF THE SELECTIVE SERVICE LAW AND REGULATIONS¹

WHEN this country became involved in the European War, bar associations throughout the country formed committees to organize war work in which members of the bar might be useful. In the city of New York, the Association of the Bar of the City of New York, the New York County Lawyers' Association, the Brooklyn Bar Association, the Association of the Bar of the County of the Bronx, the Queens County Bar Association, the Richmond County Bar Association and the Lawyers' Club, each appointed a War Committee. These committees announced that their purpose was to consider how members of the associations they represented might render assistance to the government, to the state, and to the city, and might also extend aid to members of the legal profession serving with the land and naval forces of the country, and their dependents. For the purpose of avoiding duplication of labor and expense and of securing efficiency, these committees were on May 2, 1917, amalgamated and there resulted the War Committee of the Bar of the City of New York which has since, in a variety of ways, made itself useful in connection with war work.

The War Committee first sought to marshal the

¹ Address delivered at the annual meeting of the New York State Bar Association held in New York city January 11-12, 1918, by Mr. Taft, chairman of the War Committee of the Bar of the City of New York.

resources of the bar of New York City by addressing a circular letter to its 14,000 members, inviting their coöperation and requesting them to give information which would aid the committee in organizing the work. Responses were received from nearly 4,000 lawyers and information was thus obtained which, on being classified and card catalogued, has enabled the committee to call to its assistance members of the bar as occasion has arisen.

It has been an important part of the work of the committee to give to enlisted men and their dependents gratuitous advice concerning their personal affairs before they leave the country. This work has included the settlement of claims growing out of controversies over leases and other contracts, the drawing of wills, trust deeds and other papers, advice with reference to real estate, life insurance and partnership matters, and concerning the adjustment of domestic difficulties of a variety of kinds and the right of municipal employees to receive a portion of their salaries after entering the military service. This work has been dealt with under the direction of a subcommittee by a force of volunteer lawyers who have been pretty continuously engaged upon it. The committee has not undertaken to conduct lengthy litigations or otherwise to perform legal services which promised to be protracted, and especially where the financial condition of applicants has made it suitable that they should employ their own lawyers and pay for their services. It has rather devoted itself to settling the exigent affairs of men called into the service, by giving them reliable, prompt and gratuitous legal assistance. In order that enlisted men should know what the committee offered to do, notices have been inserted in the newspapers and have been posted in armories,



camps and other places where they would attract attention.

The committee proposes to enter upon relief work, but happily this has not yet proved to be necessary. It is known, however, that a substantial number of lawyers have entered the military service, and it is quite probable that they and their dependents will some time require assistance. We are considering ways and means for raising a considerable sum of money to afford relief when the occasion arises. The distress among the professional classes in England and France has been widespread and severe, and organizations for their relief have found much to do in those countries.

At the outset it was thought that provision could be made for the care of the business of lawyers called to the front. Indeed, that part of the proposed work attracted more attention than any other. It had a sentimental aspect, since an organization for such work implied not alone patriotism and self-sacrifice on the part of the lawyers remaining at home but also a certain commendable comradeship among members of the profession. From all parts of the country inquiries were received as to the manner in which it was proposed that the business of lawyers entering the army should be conserved. The expectation, however, that this part of the work would require serious attention has not been realized. With one or two negligible exceptions, no applications have been made to the committee for its assistance. The difficulty about conserving the practice of absent lawyers (apart from the reluctance of clients temporarily, at the instance of an outside agency, to put their affairs in the hands of other lawyers), is the fact that lawyers who have any business worth preserving have, without the intervention of the committee, made private arrangements

with fellow members of the bar. Especially is this so with the older lawyers who have become officers in the military service; and the younger lawyers within the draft age are generally law clerks, or, if they have an independent practice, it is more or less spasmodic and accidental, and cannot be anticipated or provided for. In England the conditions are quite different, and in some cases it has been found quite practicable to conserve the business of barristers going to the front; but in this country provision of that kind does not seem to be practicable.

The War Committee on its organization made a written tender to numerous officers of the federal, state and municipal governments of its coöperation in connection with any war work in which legal ability and experience might be useful. This tender has been availed of with frequency, and the committee has been able to procure and organize for the government the gratuitous services of many lawyers in a variety of ways.

It selected and recommended to the United States Attorney for the Southern District of New York, twenty-five lawyers to investigate evasions of the draft, applications by alien enemies for permits and suspicious cases of a variety of kinds requiring the confidential coöperation of reliable assistants. The War Committee aided the Director of the State Military Census, advised him as to his powers and prepared the forms for use in the administration of the law. At the request of the Mayor's Committee on National Defense, it obtained the gratuitous services of about forty lawyers who under the first draft aided in organizing, and at the outset in advising, the Local Exemption Boards. At the request of the Adjutant General, the committee recommended 189 carefully se-



lected lawyers who acted in the first draft as the representatives of the Provost Marshal General in the Local Exemption Districts in the city of New York, and an additional number of lawyers who performed similar work before the District Board for that city, aiding that Board in the decision on appeal of upwards of 40,000 cases.

It is now well known to members of the profession that the new Selective Service Regulations of the War Department and the questionnaires provided for thereunder, were of such a complicated character that the government wisely determined that success in classifying the remaining registrants under the Selective Service Law, would necessitate the coöperation of the entire bar of the country in aiding the registrants in filling out their questionnaires and in advising them as to their rights.

In the first draft about one million out of the aggregate number of nearly ten millions of registrants were called, and between 600,000 and 700,000 were inducted into the army. Difficulties were experienced, however, in proceeding in this manner, and it was decided by the War Department that the entire body of registrants who had not been inducted should be classified in the order in which they were to be selected for service in the army; and that thus, by a single operation the government should obtain all of the information which would enable it to make an army and at the same time make provisions for the industrial needs of the country. The President in his Foreword to the Regulations, said: "We must make a complete inventory of the qualifications of all registrants in order to determine, as to each man not already selected for duty with the colors, the place in the military, industrial or agricultural ranks of the nation in which his experience

and training can best be made to serve the common good. This project involves an inquiry by selection boards into the domestic, industrial and educational qualifications of nearly ten million men."

The general plan seems to have been in part based on the successive steps taken by England which ultimately developed into the present Conscription Act. After an effort to raise an army by voluntary enlistment had proved to be unsatisfactory, the British Parliament in July, 1915, passed the National Registration Act, which was designed to ascertain in districts the supply of different classes of labor and of men of military age. This registration proved to be very useful in Lord Derby's effort to raise an army by voluntary enlistment, but an army of sufficient size could not be raised in that way within the limited time at hand; and there followed in January, 1916, the first Military Service Act which applied to unmarried men, and widowers without children dependent upon them, who were from eighteen to forty-one years of age. Many of the features of our own Selective Service Law, including those relating to immunity from conscription on account of employment in industrial occupation which, in the national interest, it was of importance not to interrupt, or of the dependency of relatives who would become a public charge if deprived of support, were in some form contained in this law; and provision was made for local tribunals like our Local Exemption Boards, as well as for a system of appeals. This act also proved to be inadequate, and in May, 1916, the Second Military Service Act was passed, which included within its provisions every male British subject between the ages of eighteen and forty, and all men thirty days after they became eighteen. The act extended the time of the men then in the service

and recalled all the time-expired men under forty-one.

It is thus evident that Great Britain arrived at a complete scheme of conscription only by passing through a number of experimental stages. This progressive development has undoubtedly been of great value to our government and has saved us much discussion and probably many difficulties which the prompt passage of the Selective Service Law and adoption of the regulations have avoided. To some extent, however, the first draft in this country was experimental—or at least it suggested that methods might be adopted which would be more comprehensive and thorough; and accordingly a system was devised which, by a single process, sought to classify the entire body of registrants and enable the government with certainty to ascertain the extent and the character of the military resources of the country so far as they were dependent upon men between the ages covered by the law. As the Provost Marshal General announced, the design of the new regulations without the “haste and confusion” necessary under the first draft was to take from each community “only those who can be spared with the least possible interference with the domestic and economic life of the community,” while the nation was at the same time enabled to meet at home “problems of industrial, agricultural and economic conservation with which we are bound to be confronted.” The elaborate system which was resorted to was no doubt necessary to accomplish these results, and I have no hesitation in saying that the regulations through which the system is being carried into effect, in its general plan, in the completeness of detail and in the prevision which marks the manner in which it deals with new and anomalous conditions, is a very creditable, if not a very remarkable, piece of

legislation. The regulations are necessarily voluminous and complicated, and, without a knowledge of their provisions, the questionnaire, on the answers to which the entire classification is based, is, even to a lawyer, somewhat confusing. Even under the first draft one of the chief sources of difficulty came from the mistakes of registrants from their ignorance of their rights and duties under the law; and the embarrassment from the same cause became greatly increased by the more comprehensive and permanent character of the new regulations; indeed, it made, in the words of the Provost Marshal General, the creation of Legal Advisory Boards to assist registrants in correctly answering the questionnaires "one of the most vital necessities of the new system."

The opportunity thus afforded by the regulations for the participation by the legal profession in the enormously important work of raising the national army is an event of no small importance in the history of the bar. In transmitting the regulations to the governors of the several states, and requesting the coöperation of the state and local governments in carrying the plan of the Selective Service Law and Regulations to a successful consummation, the Provost Marshal General stated that it was contemplated that it would be necessary to create an organization in each state which would absorb all members of the legal profession and "assign to each a definite place and duty in the winning of this war." He added:

"We have not yet given the legal profession a definite place in the organized ranks of the nation, and what is here proposed offers a chance that should be welcomed enthusiastically by every lawyer in particular and by the whole legal profession . . .

"No more important post could be offered a lawyer at this

time than the active duty of assisting in the raising of our armies and in this way can be provided a very necessary auxiliary of the selective service system without making any demand on the time of any lawyer to which any patriotic citizen would hesitate to respond."

And the President in his Foreword to the Regulations themselves, said:

"I urge men of the legal profession to offer themselves as Associate Members of the Legal Advisory Boards to be provided in each community for the purpose of advising registrants of their rights and obligations and of assisting them in the preparation of their answers to the questions which all men subject to the draft are required to submit."

In line with this suggestion, in section 30 of the regulations, it is further stated:

"It should be the pride of every lawyer that no registrant within his district is without competent legal advice and assistance in preparing all papers that such registrant is required to submit in the process of the selection of citizens of this nation for duty in the present emergency."

And by section 46 it is asserted that it is inconsistent with the duty imposed upon members of the Legal Advisory Boards "to seek clients for the purpose of urging and advocating individual cases in any other way than as disinterested and impartial assistants of the selective service system," while by the same section, lawyers are urged "freely and without compensation to give their best service to the nation."

The duty of Legal Advisory Boards extends to advising as to the true meaning and intent of the law and regulations, of assisting registrants in making answers to the questionnaire, and in aiding "generally

in the just administration of said law and regulations.” There is thus imposed upon members of the bar a most important and a most delicate duty. It does not create precisely the relation of lawyer and client, but the service bears more resemblance to the judicial function, while it is in important features administrative. No member of the Legal Advisory Board in advising a registrant is to forget the duty he owes to the country to administer the law and the regulations according to their true intent and meaning for the purpose of raising an army; nor, on the other hand, should he forget the vital interests of the registrant who is called upon to sacrifice his personal comfort, his property interests, and perhaps his life.

The duty which the bar at large was called upon to perform called not alone for strenuous effort and the setting aside of convenience and business engagements, but also for the performance of high and patriotic duties. The call of the President was responded to with patriotic zeal. The bar as a unit sprang to the assistance of the national government, and the manner in which the service was performed should tend to remove prejudice which sometimes has existed concerning the useful function of the lawyer in our system of government.

The regulations provided for the appointment of Legal Advisory Boards of three Permanent Members in such districts as might be created by the governor of each state. Members were also to be appointed in such numbers as might be necessary to provide adequate assistance. Outside of the greater city of New York, Governor Whitman constituted each county of the state (with one or two minor exceptions) a single district within which a Legal Advisory Board was to be appointed; but he made the greater city of New York

a single district, and appointed one board of three Permanent Members to organize the lawyers of the city. That Board subdivided the work among the five boroughs composing the municipality, and appointed in each of the boroughs an Auxiliary Legal Advisory Board of three Associate Members. Each borough was in turn divided into subdistricts corresponding to the Local Exemption Districts under the jurisdiction of the Local Exemption Boards, and a Legal Advisory Board of three Associate Members, known by the name of a Local Law Board, was set up in each Exemption District. There was thus constituted a skeleton organization composed of nearly 600 lawyers. But, as there were about 540,000 registrants in New York City, who would be required to respond to the questionnaire, it was decided from an estimate of the average time which would be occupied in filling in the questionnaire of each registrant and otherwise advising him, that there would be required not less than 3,000 lawyers. Accordingly, provision was made for the appointment of an additional number of Associate Members to be assigned to the Local Law Boards in the several districts in such numbers as it was thought they might be required. Local Law Boards in each district were required to determine the numbers of additional Associate Members that were necessary and upon their recommendation such members in large numbers have been appointed.

There have been formally designated in the City of New York by the Permanent Members of the Legal Advisory Board, nearly 3,000 lawyers, all of whom have taken the oath of office required under the provisions of the regulations and have, since the regulations went into effect, been actively employed in the performance of their duties. The War Committee of

the Bar rendered active assistance in the selection of Associate Members of the Legal Advisory Board, and in its initial stages acted as the unofficial agency by which the Legal Advisory Board has been able to erect the organization above described. When the organization was complete, offices were established. An extensive central office organization became necessary and was established in the Hall of Records Building in the city of New York, in rooms furnished by the city. In each of the boroughs also it has been necessary to maintain a permanent office organization, since the magnitude of the work and the necessity that it be done with thoroughness and uniformity throughout the city required that it be directed through the intermediate agency of the Auxiliary Boards in the several boroughs. In maintaining the several central offices a large expense has been incurred for clerical assistance, printing and other office expense. No appropriation was made by the law or the regulations for such expense and it has been borne entirely by voluntary subscriptions by lawyers of the city, collected through the agency of the War Committee.

The service of the bar called for by the regulations was to be nation-wide. A copy of the questionnaire, the letter of General Crowder to the governors of the several states, and the Foreword of the President, was sent to each of the 11,000 members of the American Bar Association; and in section 30 of the regulations it was stated that for the assistance of the governor of each state he was to have the active coöperation and assistance of the American Bar Association. It was suggested in the regulations that the advisory board in each district should be presided over either by the county judge or a judicial officer having a similar jurisdiction. This suggestion has generally been adopted

and throughout this state the work has been organized by the county judges, calling together the lawyers of the several counties and organizing the entire bar to assist. In New York City this procedure was not practicable because the number of judges was insufficient to equip the local districts, and, furthermore, they would have been unable to spare the time from their judicial duties for the performance of the work. The judiciary of each borough, was, however, consulted in the selection of auxiliary boards; and the importance of the work was quickly recognized by the courts, the Appellate Divisions in the First and the Second Departments making a rule that engagement of counsel in the work under the Selective Service Regulations was to be accepted as an excuse for the adjournment of cases in all the courts. We have been informed that in some of the states the work occupied so much of the time of the lawyers that the courts were adjourned for considerable periods of time.

It is not possible at this time to give definite information as to the percentage of registrants who availed of the services of the Legal Advisory Boards. Since they were constituted under the regulations and had their official status confirmed by an oath of office taken as officers of the federal government, it is, perhaps, not unnatural that among the ignorant and the suspicious, misrepresentations should have been made and feelings of antagonism engendered, which have united to prevent some registrants from availing of the services of the boards lest they should be used as instruments of the government to induct registrants into the army, even though they might be entitled to deferred classification or even to exemption. The government, however, wisely insisted that the law should be administered through local agencies and with ref-

erence to the character, occupation and susceptibilities of localities; and the justice with which, in the main, the regulations have been enforced by the neighbors of the registrants themselves, has tended to dissipate the misunderstanding and prejudice. To some extent no doubt the propaganda of our enemies invaded the local exemption districts and sought to reduce the efficiency of the selective service system. The foresight of the government, however, and the experience of the local boards and the coöperation of the Legal Advisory Boards, reduced to a minimum the danger of such interference, and up to the present time the classification provided for in the regulations has been a most gratifying success.

MINUTE CONCERNING WAR

At the close of the reading of the foregoing paper, Henry W. Taft presented the following minute, which was unanimously adopted by the Association:

“The New York State Bar Association affirms its unwavering loyalty to the nation and pledges the united support of the bar of the state to the Government of the United States in the vigorous prosecution of the war. We rejoice that the legal profession has been called upon by the President to give its aid in an important way in the classification of our citizens who are to compose our army. We take pride in the patriotic and zealous manner in which this duty has been performed; for we believe that the raising and equipment and transportation of our military forces should be the chief concern of every true American citizen, in accordance with his opportunity and to the extent of his ability.

“While criticism of such preparation, if based on a patriotic desire for the effective prosecution of the war, should not be discouraged and is sometimes helpful, we denounce opposition springing from political motives, indifferent patri-

otism or downright disloyalty. We suffer with scant patience assertions of the sanctity of free speech from those who oppose the war on narrow and technical views of our rights under international law. The country has no time to listen to the subtle distinctions of men whose speech gives aid and comfort to the enemy. If such contentions do not conceal hurtful and disloyal propaganda, at least they hamper the government in the speed and effectiveness of war preparations.

“We have an abiding belief in the justice of our cause. In disregard of international law, and against our solemn and repeated warnings, Germany persisted in an inhuman submarine warfare; and when American lives were lost there was no recourse but war. But reparation for loss of life is not the sole purpose of the war, for the defeat of the Central Powers is necessary if civil liberty is to be preserved throughout the world. The German conception of the state is based upon an inexorable philosophy which demands and cannot exist without, an autocratic government, and that in turn would fail if it were not sustained by military force at home and by implacable methods of warfare abroad. It is a philosophy which exalts the idea of force and would transmute the world into an armed camp, and the arts, the sciences, the humanities and religion, would stand still or retrograde while the nations of the earth were engaged in a struggle for self-preservation.”

REPORT OF THE WAR COMMITTEE

IV

REPORT OF THE WAR COMMITTEE ¹

THE War Committee begs leave to submit the following report:

This committee was appointed pursuant to a resolution adopted at the last annual meeting. Its duties were not defined; but as the war progressed, the committee has assumed that it could perform a useful function by gathering information as to the war work being done by lawyers throughout the state, and by determining whether such work could be usefully coördinated.

At the last annual meeting of the Association, the chairman of the committee made a comprehensive statement of the war work undertaken by lawyers in the city of New York (*Annual Report, 1918*, page 212). That work has continued with increasing activity. The Executive Committee of the War Committee of the Bar of the City of New York has recently made a comprehensive report concerning its activities and those of the Legal Advisory Boards, and your committee is of the opinion that so far as the city of New York is concerned, it can do no better than file that report as a part of its report. It is, therefore, annexed hereto and marked "Schedule 1." (Schedules 2, 3 and 4 contain merely statistical information and are omitted.)

Your committee has sought to obtain from other parts of the state information as to the activities of members of the bar in war work. It addressed a circular letter to the chairmen of 57 Legal Advisory

¹ Report presented by Mr. Taft as chairman of the War Committee of the Association at the annual meeting of the New York State Bar Association held in New York City January 17-18, 1919.

Boards and the presidents of 54 county and other local bar associations.

There have been received 93 responses, reporting more or less fully what has been done. These have a certain historical value to the profession and they have therefore been delivered to the secretary of the Association in order that they may be preserved in its archives.

The work of lawyers in the rural communities has been of the same general character as that in the cities of the state. Practically the entire bar of the state has been engaged in war work similar to that done in the city of New York by both the War Committee of that city and the Legal Advisory Boards, which was fully described in the address of the chairman of this committee at the last annual meeting and also in the report of the War Committee just referred to. In some parts of the state the Legal Advisory Boards have not only aided in the enforcement of the Selective Service Law, but have also given free advice to enlisted men and their dependents, and engaged in patriotic work of a general character. In other parts of the state bar associations have organized the work. In no place outside of the city of New York has the work been of such a volume as to require an organization like the War Committee of the Bar of the City of New York, although in some cases the Legal Advisory Boards have appointed sub-committees to advise enlisted men, and much more frequently than in the city of New York, have registrants, enlisted men and their dependents been advised by lawyers at their offices. In many parts of the state the work of lawyers has been organized to aid in Liberty Loan and War Savings Stamp campaigns, and they have also coöperated in the drives of the Red Cross, the Young Men's Christian

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Association, the Young Women's Christian Association, the Knights of Columbus, the Jewish Welfare Board, the War Camp Community Service, the American Library Association and the Salvation Army. They have also actively participated as "Four Minute" men in making patriotic speeches, and have naturally had to deal with war risk insurance investigations and matters of allotments to dependents of enlisted men. In some parts of the state where there were few lawyers, it has been necessary for them to call to their aid laymen who were directed by lawyers in the work of aiding registrants to fill in questionnaires. Thus, in the county of Essex, where the entire bar numbers only 20 lawyers, it was necessary to call to their aid 73 laymen with whose coöperation the legal advisory work of the county was efficiently performed.

The work of the lawyers was, of course, everywhere performed gratuitously and apparently with industry and patriotic ardor. The work was organized in the manner best adapted to the locality and particularly with reference to the means of transportation. In some of the counties headquarters had to be established at a central point and branch committees organized for the convenience of registrants, while in the larger cities it became necessary to organize auxiliary and local boards with an adequate number of associate members.

The committee has obtained from the Selective Service Headquarters, formerly the Adjutant General's office, which is the agency through which the Governor has acted in administering the Selective Service Law, certain statistical information which has historical value, and which it deems advisable to place in the archives of the Association.

There were approximately 12,000 Associate Members

of Legal Advisory Boards in this state, of whom about 5,330 were in the city of New York, all except a negligible number being lawyers. In each of 58 districts constituted by the Governor, which, except in the case of large cities, corresponded with the counties of the state, three Permanent Members of the Legal Advisory Boards and a sufficient number of Associate Members were appointed. In each district for which a Local (Exemption) Board was established, a Government Appeal Agent was appointed. In most of the counties this officer was the District Attorney or the Corporation Counsel, although in the larger cities it was not possible to fill the office in that way. That was particularly the case in New York City. The duties of the office required the appointment of a lawyer and the duties of the agents were generally arduous and of great value to the local boards. There were 435 appeal agents appointed. It is estimated by Major Hutchinson, in charge of the Selective Service Headquarters at Albany, that ninety-five per cent. of all registrants throughout the state received the assistance of members of the Legal Advisory Boards. The magnitude of the work may be inferred from the fact that 2,521,988 men were registered in this state, of whom 1,482,859 were registered in New York City. Each of the twelve thousand Associate Members of the Legal Advisory Boards thus advised on the average 200 registrants.

Your committee has been furnished by the Provost Marshal General with some interesting information concerning the participation of lawyers throughout the country in the execution of the Selective Service Law. Approximately 1,500 lawyers have been members of local boards; and many attorneys served upon the District Boards which held the relation of appellate

tribunals to the local boards, and also had original jurisdiction over claims for exemption and deferred classification, based upon agricultural, industrial and occupational grounds. 10,900 lawyers have been Permanent Members of Legal Advisory Boards, while 108,000 have been Associate Members of such boards. Approximately 4,700 lawyers have served as Government Appeal Agents. As there are, according to the Census Bureau, 131,909 lawyers in the United States, it thus appears that almost the entire bar of the country has been engaged in one capacity or another in aiding in the building of an army through the provisions of the Selective Service Law. There have been 371 lawyers commissioned in the Judge Advocate General's department. The states from which these have been appointed appear from a statement furnished to the committee by the Provost Marshal General. Of the total number 48 of those receiving commissions came from New York. Forty-two lawyers have been appointed as members of the Army Service Corps to act as claim adjusters in the Judge Advocate General's department.

At first the Adjutant General and later a special bureau under charge of Major Hutchinson were designated by the Governor to administer the Selective Service Law within the state. The work was largely directed by lawyers. In New York City, where there were over one million four hundred thousand registrants, the burden thrown upon the Director of the Draft was enormous, particularly during the last two registrations, when Mr. Martin Conboy, a lawyer of New York City, contributed in a conspicuous degree to the efficient working of the law. His predecessors in office had been two other lawyers of standing, Mr. Roger B. Wood and Major Philip J. McCook.

It has not been practicable to ascertain the number of lawyers volunteering their services in the governmental departments and engaging in both civil and military work incident to the war. It is a matter, however, of common observation that there have been large numbers of members of the bar who have, in the most patriotic and self-sacrificing way, abandoned their business and devoted their entire time and skill to aiding the government in administering the departmental affairs, which, during the war, have been enormously increased. Many of these volunteers have engaged in work not strictly legal but of a kind in which their training and experience have made them particularly efficient.

It has not been possible to obtain reliable statistics as to the number of lawyers who have entered the military service. In most parts of the state, however, large numbers of lawyers of military age have received commissions in the army and the navy. In addition to these the committee is informed by the Provost Marshal General that of the entire number of lawyers in the United States, there are 17,218 who are between the ages of 21 and 30. There have been inducted into the army under the Selective Service Law, 5,000 lawyers, and undoubtedly most of these are between the ages mentioned. Those inducted were undoubtedly all in Class I. In the state of New York the total number of registrants was 2,521,988 and of these 254,198 were inducted into the army. It would seem, therefore, from these figures that the proportion of lawyers inducted into the army was probably greater than that of other classes of the community.

Neither accurate nor comprehensive information has been available as to the casualties among lawyers who have been in the military service of the country. It

may be possible a year hence to obtain information upon this point and it is the hope of the committee that it will be continued for the purpose of gathering information upon that and other matters connected with the war during the coming year.

Finally, the committee is of the opinion that the character and extent of the participation of lawyers in all of the activities incident to the war has reflected the greatest credit upon the profession. This war has brought into play great activity in all the physical sciences, and among all of the belligerents scientists have vied with each other in devising means and instruments of warfare to overcome their enemies. But in no previous war have those trained in the science of law been called upon to devote their skill as lawyers to the prosecution of the war, and it has remained for this great World War to disclose that for the prompt and efficient making of a great modern army, through a universal draft law, it is necessary to call to the aid of the executive departments those trained in the science and practice of the law. Whether the task could have been accomplished at all without the assistance of the lawyers need not be asked. It is at least certain that the Provost Marshal General was entirely correct when he said that by the conception of the Selective Service Law and Regulations, the members of the legal profession had been given "a definite place in the organized ranks of the nation," that "no more important post could be offered a lawyer at this time than the active duty of assisting in the raising of our armies," and that in this way he would become "a very necessary auxiliary of the selective service system." And it is equally clear that the bar of this country took to heart the appeal of the President for coöperation and made it a matter of pride and patriotism that nothing

that was expected of the members of the profession should be omitted.

SCHEDULE 1

REPORT OF THE EXECUTIVE COMMITTEE OF THE WAR COMMITTEE OF THE BAR OF THE CITY OF NEW YORK

TO THE WAR COMMITTEE OF THE BAR: At the commencement of the war the seven organizations of lawyers in this city appointed war committees. These organizations were the Association of the Bar of the City of New York, the New York County Lawyers' Association, the Brooklyn Bar Association, the Association of the Bar of the County of Bronx, the Queens County Bar Association, the Richmond County Bar Association and the Lawyers' Club. The War Committee of the Bar was formed by the amalgamation of the committees of these organizations into a single body.

The bar of this city numbers about fifteen thousand members. Probably not more than four or five thousand of these are members of bar associations. Many lawyers have, therefore, found that membership in an association is not essential to the honorable pursuit of professional activities. Yet bar associations are the only mediums through which the profession can give organized expression to its views and unite in carrying them into effect. Action, therefore, by bar associations is generally regarded as reflecting the views of the profession; and in that sense the War Committee of the Bar may be regarded as representative of the bar of this city. In order to secure the sympathetic support of lawyers not members of these seven associations of the city, the committee sent a circular letter to the fifteen thousand members of the bar of the city, inviting their coöperation and requesting

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them to give such information as would enable the committee intelligently to call upon them for assistance. About four thousand lawyers responded, patriotically tendering their services, and many of them have from time to time been called upon by the committee for assistance, although the burden of the work has necessarily fallen upon a relatively small number of devoted volunteers who have been able and willing to take from their other occupations a sufficient amount of time to enable the committee to do efficient work.

THE CHARACTER OF THE WORK DIRECTED BY THE COMMITTEE

The committee received no charter of its powers further than was contained in the announcement of the committees of some of the associations, that it was their purpose to render assistance to the national, federal or city government, and to extend aid to members of the legal profession serving with the land and naval forces of the United States, or their dependents. It was not deemed by your committee that lawyers as an organized body need engage in such gigantic relief work as that of the Red Cross and other similar organizations, but that it should seek in coöperation with them to bring to their aid the kind of skilled service which lawyers better than any other body in the community were qualified to render.

The committee has always contemplated taking up work for relief of destitute lawyers or their families, and it may be that ultimately something will have to be done in that direction. Up to the present time, however, few cases requiring such relief have been called to the attention of the committee; and it is probable that the committee will not find it necessary to do more than to investigate cases needing relief, and to refer them for pecuniary assistance to such organizations as

the Red Cross and the Young Men's Christian Association, whose funds are more adequate than we could ever expect the funds of a professional committee to be. The relations which the committee has established with these great relief organizations afford a basis for the belief that cases of financial distress can be adequately dealt with in the manner indicated.

Another branch of work which it was thought might engage the activities of the committee was the care of the business of lawyers called to the front. In England it was found that it was practicable to conserve the practice of both solicitors and barristers in the service. Although the willingness of the committee to act as the intermediary in a similar way in this country was given much publicity, few cases have arisen which have required attention; and in these the experience of the committee leads it to think that the conditions of practice in this country are such as to render arrangements for conserving a law practice either impracticable or unnecessary. In a few cases dealt with by the committee private business arrangements with professional friends have been made by older lawyers going into the service. The large number of the younger lawyers who were within the first draft had not generally established a practice of such a permanent character that it could be conserved.

The activities of the committee have developed as the war has progressed, and a justification for its existence has appeared in the insistent and continuous demand for its services. Broadly speaking, its work has been, first, the furnishing of gratuitous professional services to enlisted men and their dependents, and, second, the mobilization from time to time of lawyers in order to furnish to governmental agencies and to the larger relief organizations like the Red Cross,

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the Young Men's Christian Association and Mayor's Committee, expert and gratuitous professional service.

SERVICES RENDERED TO ENLISTED MEN AND THEIR DEPENDENTS

The committee has rendered services in a greater variety of matters than would ordinarily arise in any well-organized law office. It has dealt with controversies over leases and other contracts; it has drawn wills, trust deeds and other documents with reference to real estate; it has advised as to life insurance and partnership matters; it has adjusted domestic difficulties of a great variety of kinds; it has studied and advised as to the right of government employees to receive compensation after entering the military service; it has had to consider and seek to have applied innumerable provisions of the War Risk Insurance Act and Civil Rights Act; it has handled claims for personal and property damage, and has settled many claims growing out of purchases of furniture and other articles upon the instalment plan; and it has frequently been called upon to abate the rigor of the landlord and tenant law in dispossess cases. The committee has attempted to deal with the exigent affairs of men called into the service and their dependents, and has sought to create a feeling among them that they could turn to the committee with confidence that they would receive sound advice and would not be victimized by charges which they could ill afford to pay; but where the property involved or the character of the service has made it appear that lawyers should be employed and paid for their services, the committee has not hesitated to decline to act. It would be hard to describe the perplexity of those seeking the aid of the committee, due sometimes to ignorance of the affairs of life, some-

times to suspicions springing from painful experiences with unreliable lawyers, and frequently in the case of those living at a distance, to strangeness of environment. The relief which has been afforded to the most ignorant and most humble has more than compensated for the time and trouble which have been devoted to the work; and the committee has reason to believe that the army and navy authorities, as well as the enlisted men, have regarded the services of the committee as contributing in a sensible degree to the equanimity of our brave men who have gone to the front—a condition essential to the efficient discharge of duty.

Reference has been made to the Civil Rights and War Risk Insurance Acts. The Civil Rights Act gives to the enlisted man the benefits of a stay. Under its provisions the committee has negotiated the termination of numerous purchases on the instalment plan and has made satisfactory adjustments of other claims such as contracts for the purchase of country lots, while in numberless dispossession cases indigent dependents of soldiers have been protected against inconsiderate landlords. The committee has not been able to deal with the thousands of cases involving allotments, allowances and insurance under the War Risk Insurance Act, since the volume of such cases has required, for anything like adequate treatment, such an organization as the Red Cross. Yet in many cases of delayed allotments the committee has had the satisfaction of giving comfort to the destitute dependents of enlisted men. Many cases have arisen where allotments have been made to unworthy wives, and it has been necessary to obtain divorces as a means of establishing a case upon which the allotment could be terminated.

The attention of the committee has been much occupied by applications for discharges from the service

where men have been inducted either through misunderstanding, mistake or ignorance. The effective treatment of this class of cases has required that the committee establish relations with the camp authorities, particularly at Camp Upton. Each case has required an investigation of home conditions, a report by the Local Exemption Board and perhaps by the Government Appeal Agent. Certificates of physicians and birth and marriage certificates have to be obtained, and affidavits are frequently necessary. The committee has endeavored to act in an impartial way, and it is believed that the commanding officers in the camps have placed much reliance upon its reports. One case will serve to illustrate how meritorious such cases may be. A young man of 22 years of age was the only healthy member of a family of eight children ranging from 4 to 18 years; four of the family were tuberculous, one just recovered from an operation for appendicitis, and another with heart trouble, in the hospital. The father was confined to his bed with tuberculosis and chronic rheumatism. The enlisted son was earning from \$25 to \$28 a week, all contributed to the support of the family. Through ignorance, he failed to interpose the claim of dependency, and, as a result, was inducted, leaving at home eight little brothers and sisters and a sick father and mother. We are now at work endeavoring to procure the discharge of the young man.

It is obvious that frequently the work of the committee must overlap that of organizations like the Red Cross, but we repeat that the committee has, as a rule, endeavored to confine itself to cases which require a legal training and experience. Working arrangements with the Home Service Section of the Red Cross, the Young Men's Christian Association, the Young

Women's Christian Association, the Law Committee of the Mayor's Committee, the Council of Organizations for War Service, the Jewish Welfare Society, and a number of settlement societies and other organizations have been made, and it is understood by these organizations that the committee is equipped to deal with all cases which require the services of trained lawyers.

Efforts have been made, by notices extensively posted in near-by camps, arsenals, armories and throughout this city, particularly in the vicinity of the railroad stations, to bring the committee to the attention of men in the service, and the existence and purpose of the committee is known to the commanding officers of all encampments in this vicinity, and of all warships and vessels engaged in the transportation of troops. Sailors upon warships and upon transports are frequently referred by their commanding officers to the committee. A visit to the offices of the committee will give some idea of the volume of the work done and will disclose an accumulated mass of correspondence and records. The constant attendance of women, children and enlisted men awaiting attention to their cases will excite human interest and sympathy.

It is perhaps pardonable to say that the workers of the committee have received a reward for their patriotic efforts, not alone in the consciousness of a patriotic duty well performed, but also in numerous expressions of gratitude on the part of those who have received the benefit of the services of the committee. Frequently this gratitude has been expressed in letters written after the service has been performed. A sister of an enlisted man, for instance, writes to our Executive Secretary, "You in particular and your organization in general would oblige to accept my meager, though heartiest thanks for your effort, manliness

and promptness withal in behalf of my brother 'Over There'"; and a second-class seaman thanks the committee for recovering \$7.50 from a hotel because it had accomplished what he could not have done, adding, "I reiterate my thanks for your prompt attention and can assure you it heartens a man in training to feel that the public is behind him." Another enlisted man who was troubled about the settlement of his partnership affairs, says: "Your courtesy and prompt attention in this moment of need is a real service to me and I appreciate what you are doing not only for me but for other sailors and soldiers as well." A wife of an enlisted man having a claim for \$100, writes: "I cannot tell you how delighted I am at the way you have taken care of this for me. I think the committee is splendid and I wish I could express my appreciation for what you have done for me."

SERVICES RENDERED TO PUBLIC OFFICERS

From its organization the committee has been made use of by public officers to aid by advice and also by recommending lawyers for appointment to positions requiring professional knowledge. The United States Attorney for the Southern District of New York has frequently called upon the committee to investigate and report upon qualifications of lawyers to be appointed special assistants in his office, and particularly those to be designated for voluntary service in representing the government in the prosecution of important cases involving sedition and treason. At one time the committee recommended 25 lawyers as assistants to the United States Attorney to investigate evasions of the draft, applications by alien enemies for permits and suspected offenses against war measures. The com-

mittee aided the Director of the State Military Census in advising him as to his powers under the state statute, and prepared a set of forms for his use. The service of the committee in connection with both the first and the second selective service statutes has been continuous. At the outset the committee aided the Mayor's Committee in obtaining the services of 40 lawyers who aided in organizing the Local Exemption Boards throughout the city and in advising them as to their duties. It then investigated the qualifications of 189 lawyers to act as appeal agents under the Selective Service Law, and in the second draft it was called upon to fill vacancies and to recruit the force of these appeal agents. Where vacancies now occur resort is still had to the committee to fill them. Recently the committee has been asked to prepare an eligible list of lawyers qualified to serve as commissioned officers in the Judge Advocate General's department, and it has devoted much time to the consideration of several hundred applicants with a view to giving to the Judge Advocate General confidential assistance in equipping his force, as soon as an increased number of officers is required. Federal and other governmental authorities make frequent calls upon the committee for lawyers for war work and the compliance with such requests is an important part of the committee's routine work.

The organization of the Legal Advisory Boards provided for under the Selective Service Law and Regulations fell in the first instance upon the War Committee, which was the only organized body equipped to deal with the service. The first step taken by the Governor was to nominate to the President as the chairman of the Legal Advisory Board for the entire city of New York, the chairman of the War Committee. The function of the Legal Advisory Board called for the services



of the legal profession generally, but in the city of New York, which was created a district to be presided over by a single Legal Advisory Board, it became necessary to provide a very elaborate machinery for the accomplishment of the work. Ultimately this required the appointment by the three Permanent Members of the Legal Advisory Board nominated by the Governor and designated by the President, of more than four thousand lawyers as Associate Members of the Legal Advisory Board to act in an organization covering all of the 189 Exemption Districts throughout the city. The War Committee of the Bar coöperated from the outset with the Permanent Members in selecting these Associate Members, and the two organizations acted practically as a single agency in this work, as well as in equipping a central office and the borough offices established in the five boroughs of the city. The structure thus erected necessitated direction at the central office and its equipment with a large force of clerks, stenographers, file clerks, etc. In every way the War Committee and the Legal Advisory Board have co-ordinated their efforts in creating the necessary organization. During the interval between the drafts the offices of the War Committee and the Legal Advisory Board were consolidated, but during the active period of registration and classification, it became necessary to separate the offices, and the Legal Advisory Board established its headquarters in the Hall of Records building in quarters furnished to it by the city of New York. In those parts of the country where a Legal Advisory Board has been created for each Local Exemption District, the work of the Associate Members of the Legal Advisory Board cannot have been particularly burdensome or attended with any substantial expense of administration. It was not anticipated, when the

law was passed, that there would be consolidated in a single Legal Advisory district, as there were in this city, 189 Exemption Districts, with nearly two million registrants, composing nearly or quite ten per cent. of the registrants throughout the country. The necessity for erecting and maintaining during the period of the draft the elaborate machinery for such a great district was not anticipated, nor was provision made for the necessary expense it involved. It became necessary, therefore, to provide for the expense by voluntary contributions collected through the agency of the War Committee.

The work of the Legal Advisory Boards is not yet completed. The classification of the remaining registrants, numbering more than half a million men within the city, will probably occupy two or three months, and during that time the organization of the Legal Advisory Boards must be kept fully equipped and in a high state of efficiency. The continued coöperation of the War Committee in this work will be required, and through no other source can the financial requirements of the board be supplied.

It is perhaps suitable that the committee should refer to expressions of appreciation of its work. The Attorney General of the United States wrote to the chairman of the committee:

“To my mind, the movement you speak of is extremely important and should be of tremendous assistance to the government and especially the department of which I am in charge.

“In my opinion, the finest sign of the times is the large number of really first-class men (and I am happy to say many lawyers are among them) who are volunteering their services to the country without compensation.

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"As time goes by, it is not unlikely that my department may desire to avail itself of the services of a number of the attorneys you have in mind in assisting in the enforcement of the terms of that (the Selective Service) law."

A captain in the coast artillery wrote with reference to a matter where the committee's action aided in the settlement of a question involving the pecuniary interest of many men in the service:

"I feel that you have rendered a service to our country that is most valuable, as the question that you have had adjusted will enable many men who have had military training at the expense of the federal government to serve their country in this emergency who otherwise would be barred from rendering that service under the existing orders in regard to dependent relatives, and I want you to know that I appreciate the service you have rendered not only on behalf of the men in my command who are thereby enabled to serve with us, but also on account of the men in other commands who are enabled to continue to serve their country in the present emergency.

"The interest and attention that you have given to this case I will never forget and I believe that I will be able to discharge the duties of my office the better on account of the example of unselfish service that you have set for me."

The Adjutant General of the state acknowledged the coöperation of the committee in connection with the selection of his representative in this city, as follows:

"I appreciate most warmly the patriotic service which you and your committee have rendered and are rendering, and I am sure that whoever you recommend to fill this important and useful position in New York City as my representative will be an excellent choice."

The work of the committee will not end with the war.

It will continue, and probably expand until normal peace conditions prevail. After the war and in the period of demobilization of the army, and on the return of the enlisted men to this country, their affairs will require the kind of attention that the committee will be able to give, especially to those who land at this port.

No systematic record of cases requiring legal assistance has been made. One of our most valued volunteer office workers who has kept an individual diary has dealt with 600 matters between April 22d and September 2d of this year—apart from innumerable telephone conversations and minor matters not worthy of a record. Our correspondence and other records show that since January 1st of this year, 2,799 cases have been dealt with by written advice. In addition there are about 250 cases monthly in which oral advice has been given.

The work of the committee has required a force of paid assistants, including stenographers, telephone operators, messengers, etc.

It has been necessary to purchase a considerable amount of office furniture. For a time the committee was able to obtain office accommodations free of rent, but the expansion of its work finally required larger quarters, for which a substantial rental is being paid. The money to meet all of these expenses has been subscribed exclusively by lawyers, and it will be necessary to ask them to provide further funds in the near future for the needs of the committee.

The legal assistance has been rendered by a number of lawyers who have regularly devoted a certain portion of their time to the work, attending at the office at agreed hours, and more and more has the work been concentrated in the hands of a few of these volunteers.

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The committee has had upon call the services of from thirty to fifty lawyers outside of the office to whom persons needing legal assistance have been sent.

Too much praise cannot be accorded to Mr. Mountfort Mills, the Executive Secretary of the committee, who has from its organization given his entire time to the work and has displayed such industry, patience, sympathy, good sense and good temper, that he is deserving of the thanks of the profession for making it an instrumentality for good, and of the gratitude of the country for having devoted himself to a very useful war work.

EXECUTIVE COMMITTEE,
HENRY W. TAFT,
Chairman.

November 1, 1918.

**ASPECTS OF BOLSHEVISM AND
AMERICANISM**

V

ASPECTS OF BOLSHEVISM AND AMERICANISM ¹

It would be impossible in the time allotted to me to do more than sketch the outstanding features of Bolshevism and to point out how they conflict with the social and political institutions under which we enjoy the benefits of civil liberty. Perhaps I may be of some service, however, by indicating with a few broad strokes the fundamental principles of Bolshevism, and pointing out how it is at war with every principle of true Americanism.

HISTORICAL ORIGIN

Bolshevism is based upon the system of economic philosophy founded by Karl Marx and Frederick Engels, who collaborated for many years. Their doctrines were regarded as revolutionary and they were driven first from Germany, where they were born, and then from other continental countries. They finally found refuge in England, where they continued during their lives to exercise an extraordinary influence by their bold and able advocacy of revolutionary theories. Their writings, and particularly those of Marx, were most voluminous. "Das Kapital," his great work, is a voluminous work which probably few people in the world have ever read, but which among economists has excited about as much comment and controversy as the writings of Rousseau. The influence of Marx on the socialistic thought of the last century was extraordinary.

¹ Address to the League for Political Education, Carnegie Hall, New York City, December 6, 1919.

In spite of statements of some of the moderate Socialists to the contrary, the Bolshevik system is theoretically and practically based upon the doctrines of Marx and Engels. Lenin and Trotsky assert this to be the fact; and the veneration in which Marx is held by the Bolsheviks of to-day is indicated by the fact that the Bolshevik régime do not object to the substitution in public places of his picture for that of Christ.

It has been said that the doctrines of Marx were inspired by the consuming passion of hate, and a recent writer has said of him:

“He was without religion, having been conveyed from Judaism to Protestantism by his father at the age of six, and having abandoned Protestantism for aggressive Atheism when he grew to manhood. He was a man embittered by persecution, enraged by antagonism, soured by adversity, exasperated by suffering. . . . His inspiring and dominant passion was the passion of hate—hate in its virulent and peculiarly Germanic form . . . ‘Das Kapital’ (1867) is the enduring testament of Marxian animosity. It is a work of dogmatic mythology, the formula of a new religion of repulsion, the Koran of the class war.”

THE MARX DOCTRINE

This doctrine was embodied in the so-called Communist Manifesto issued by Marx and Engels in 1847. It is based upon the assumption that the proletariat, or the laboring man, has no national character and that “law, morality, religion are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.” And it adds:

“The proletarians cannot become masters of the productive forces of society, except by abolishing their own previous mode of appropriation, and thereby also every other previous mode of appropriation. They have nothing of their

own to secure and to fortify; their mission is to destroy all previous securities for and insurances of, individual property."

There is some obscurity in Marx's theory as to the abolition of property in general, but it is apparent that he proposed to abolish all property that belongs to the bourgeois class.

He adds:

"The bourgeois claptrap about the family and education, about the hallowed correlation of parent and child, becomes all the more disgusting the more, by the action of modern industry, all family ties among the proletarians are torn asunder, and their children transformed into simple articles of commerce and instruments of labor."

Then upon the question of nationality he says, "The workingmen have no country. We cannot take from them what they have not got."

Marx does not deny that Communism of his form abolishes all religion and all morality, and makes no attempt to constitute them on a new basis. He believes that political power is merely the organized power of one class for oppressing another. He dismisses with contempt the economists, philanthropists, humanitarians, improvers of the conditions of the working class, organizers of charity, members of the Society for the Prevention of Cruelty to Animals, temperance fanatics and "hole and corner" reformers of every imaginable kind. The Manifesto closes with these ominous words:

"The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The

proletarians have nothing to lose but their chains; they have a world to win.

“Workingmen of all countries, unite.”

Wilhelm Liebknecht, interpreting Marx, says that “socialism and ethics are two separate things.”

LENIN AND TROTSKY

The most influential leaders of Bolshevism have been Nicolai Lenin, whose real name is Vladimir Ulianov, and Leon Trotsky, whose real name is Leon Bronstein. The assumption of a false name has been quite common among Russian revolutionists and has no particular significance. Lenin is of an old Russian family of the landed gentry class, his father having been a local judge. He is about fifty years of age, has had a university education, is an economist of distinction, having been the author of works on Russian economics which have attracted wide attention. His elder brother killed a civil officer of high rank and was hanged for the offense, an episode which it is thought has had much to do with the radical views of the surviving brother. Lenin does not come of a Jewish family. Trotsky is a Jew and has traveled much throughout the world, having been the editor of a Russian newspaper in this city for some time. His power in the Bolshevist revolution came from his talent as an orator in influencing the people to rise. He is now the Minister of War in the Soviet cabinet. His writings show a remarkable power of expression. Others among the Bolshevist régime are men of unusual intellectual equipment. Indeed, Lenin has sought out men of force and the power of efficiency. The Minister of Education, Lunacharsky, is a man of superior power and is said to have made extraordinary efforts to found a system of pop-

ular education, all, however, founded upon the basis of the Bolshevist social and political system.

BOLSHEVIST TERMINOLOGY

We will not understand the real nature of modern Bolshevism without some attention to the meaning of some of the terms used in describing it. In the first place, the peoples of the world are divided roughly into the proletariat or proletarians and the bourgeoisie. Imperialists and aristocrats form such a small part of the population that they are negligible. Temporarily the soldiers, and especially the Cossacks, had to be recognized as a part of the ruling classes.

The term "Bolsheviki" etymologically means "the majority." At one time in the history of the struggles of the various revolutionary groups in Russia one group upon some issue then important, but now wholly forgotten, obtained and held for some time a majority in the socialistic assembly and was for the occasion called the "Bolsheviki." The other group was known as the "Menshevists" or "Mensheviki," meaning the minority. Lenin was then of the group of Bolsheviki. Trotsky was affiliated with another group. In the subsequent developments in the socialistic groups the Bolsheviki lost their supremacy and this continued through the first revolution, resulting in the government of Kerensky, which preceded that of the Soviet Republic. During all of that time Lenin and Trotsky and their associates were in the minority, but they clung to the name, Bolsheviki, although it no longer signified that it was the majority party. Indeed it was, until shortly before the fall of Kerensky, in a small minority.

The "proletariat" is the great body of the working people,—those who work with their hands with no expectation of anything beyond a wage which will supply

their daily needs. The Bolshevik loves to describe the proletariat as being the great exploited class; that is, the class whose labor has been, in the history of the world, exploited for the sole benefit of the employers, who are their oppressors.

The "bourgeoisie" are, roughly speaking, the great middle class, including those engaged in professions of all kinds, manufacturers, shopkeepers, large and small, farmers owning their lands or employing laborers, and all persons having any income, however small, from invested property of any kind. At this point it is sufficient to say that a small shopkeeper in Avenue A, earning a bare existence for himself and his family, or a woman school-teacher, who by dint of strict economy has purchased a hundred dollar Liberty Bond, or a small truck farmer owning a farm of ten acres on which he supports his growing family, or a poor college professor—all of these would be classed among the bourgeoisie, excluded, as I shall show, from all political and social influence.

Much confusion arises through the repeated assertions that the aim of the Bolshevik is to abolish all capitalistic forms of government. We have witnessed in this country great accumulations of capital by financial and industrial corporate consolidations. These have been attended by monopolistic practices and other abuses, and in spite of some benefits which they have undoubtedly conferred upon the country, they have been denounced where they have unduly encroached. But when the Bolshevik denounces the capitalistic form of government he does not refer alone to the great business enterprises with which we are familiar. He refers to the entire system under which an opportunity is given to the individual citizen, however humble, by energy, thrift and ability, to engage in any kind of

profession or business, for the purpose, by his own efforts, of advancing his position in the world and accumulating for the support of his family even the most modest fortune. We pride ourselves upon maintaining a system which holds out to the individual an opportunity and encourages him to make the best of it, bringing to bear his physical, moral and intellectual qualities to achieve success in his vocation. It is that which the Bolsheviks denounce as the chief feature of the capitalistic system, insisting upon a dead level of all the peoples of the world.

The official name of the Bolshevik government is the "Russian Socialist Federal Soviet Republic." "Soviet" is a generic term meaning a union or council. It is formed on the basis of occupation of its members, like a labor union. The government is popularly known as the "Soviet Government" because it is based upon the representation of soldier, industrial and agricultural soviets all over Russia, which send delegates to an All-Russian Congress of Soviets, which is supposed to be representative of the proletariat. From that body an executive committee not exceeding 200 members is elected and exercises supreme legislative and executive power. It forms a council of commissars which is entrusted with the general management of the affairs of the republic. It issues all decrees and takes all measures for their execution. As there is no judiciary department, or any need of one, practically the executive committee is the autocratic governing body of the republic. That committee is controlled by Lenin and Trotsky.

The representatives of the government, both national, provincial and local, are called "Commissars," and within their jurisdiction their powers are very extensive.

Some confusion arises from the use of the words "Socialism," "Anarchy" and "Bolshevism." The Kerensky government was a Socialist government. While it represented many of the ideas of the Bolsheviks, it was far less radical. Particularly it did not believe, as the Bolsheviks do, in overthrowing all existing social and economic conditions by immediate or direct action. Lenin regarded its policy as "the policy of rosewater" and expressed nothing but contempt for its professions that it intended to bring about Socialism. In this country most of the Socialists do not believe in Bolshevism. Anarchy seeks the abolition of all government. It is neither Socialism, nor Bolshevism, nor Communism. Under Socialism the state is to operate industries and nationalize property, but it is still to be maintained by a strong government. Bolshevism as now in effect is the very antithesis of Anarchism because it maintains a highly centralized and autocratic governmental organization.

WHAT IS BOLSHEVISM?

Bolshevism seeks to overthrow the entire social, industrial and political system which has existed since the middle ages. It would create a dictatorship, with the proletariat as a single governing class. While it does not necessarily destroy or banish the middle classes or bourgeoisie, it confiscates their property without compensation, deprives them of all of their political rights, and reduces them to an intolerable slavery. It seizes the property of all landowners and distributes it among the proletariat. It establishes a despotism far more powerful and widespread, and far more cruel in its repression of individual opinion and action, than ever existed under the dominion of the Czars. It deprives the individual of all hope of im-

proving his material condition in life, and forces him to be content if his barest need of food and clothing and shelter is assured to him.

THE RIGHTS OF PROPERTY

In order to secure the support of the poorer peasantry the Bolsheviks seized all agricultural lands, not by confiscation, because Lenin said that was a juridical process, but by the direct revolutionary action of the peasants themselves. The poorer peasantry were put in possession not only of the lands of the great land-owners, but also of the land of the smaller holders who had by thrift and industry themselves acquired a few acres. The shops of the small merchants everywhere were also seized by the government and nationalized without compensation.

Lenin says of the small farmers that, after all, they are "simply another variety of capitalists"; while of small merchants Trotsky says:

"Your little shopkeeper is a sober-minded man; his chief abhorrence is 'taking a risk.' Yet he has at the same time a gorgeous imagination: every little shopkeeper expects to become a Rothschild. This combination of an anæmic sobriety with an impotently riotous imagination is the very essence of the *petit bourgeois* policy."

The government seized all live stock and equipment of agricultural lands, of farmers, large and small alike, turning it over to the poorer peasantry to be worked by them for their daily support. Under no circumstances, however, was the peasant to be permitted to employ laborers or to work the land for his own profit, being entitled only to the barest support for himself and his family.

In the cities all factories and other property, including the banks, was seized and nationalized.

The entire doctrine of private property upon which our system of democratic government is based was thus abolished under the Bolshevist system, and all incentive to thrift and conservatism, and all motive for improving man's physical, mental and moral condition, through individual initiative, were swept away.

WRITTEN LAWS

A few references to the constitution and decrees of the Soviet Government will show some other ideas which it is sought to put into practical operation:

1. There is to be universal military training, but only the workers are to have arms. The non-working elements, however, may be forced to do other military duty.

2. Citizenship is granted to foreigners without complicated formality, which means that the proletariat of other countries are to be welcomed into Russia to strengthen the Soviet régime.

3. The right to use land (sub-surface deposits, waters, forests and fundamentally natural resources) cannot be obtained through purchase, rental, inheritance or any other private transaction.

4. The right to use land is not transferable. All arrangements by which the use of land is obtained secretly are prohibited.

5. Every citizen may profess any religion or none at all. Religious or judicial oaths are abolished. A solemn promise is all that is necessary in any case. No church or religious society has the right to own property.

6. All banking business is made a state monopoly, and all existing banks, public or private, are nationalized.

7. All courts and lawyers are abolished. People's courts are set up. They are to be governed by the law of the former government "only in so far as those laws are not annulled

by the revolution, and do not contradict the revolutionary conscience and revolutionary conception of right."

8. Marriage may be annulled by the petition of both parties or even of one of them.

9. Inheritance, whether by law or by will, is abolished, and upon the death of an owner all his property of all kinds becomes the property of the government.

10. No distinction is made between the relationship that arises within wedlock and that which arises out of wedlock.

THE ATTITUDE TOWARDS THE BOURGEOISIE

There is to be a "stern and unrelenting dictatorship toward the bourgeoisie." The dictatorship is to be enforced by the Red Army. Against moderate Socialism the proletarian revolution waged a merciless and uncompromising struggle and they made no secret that any counter-revolution was to be suppressed by the "merciless use of mass terror." Precisely how far this terror was extended it is impossible to ascertain. But there is little doubt that the slightest suspicion of counter-revolutionary movements led to the shooting on the spot of thousands and thousands of entirely innocent Russian citizens.

Compulsory labor was carried to the point of absolute slavery. The bourgeoisie, persons who had been in good condition in life, were set to work cleaning the streets. For this they received no compensation.

THE PRESS AND PUBLIC MEETINGS

A committee was formed called the Committee to Combat the Counter-Revolution. This committee dealt with a variety of subjects, including the press, public meetings and compulsory labor.

At the beginning of the Bolshevik régime, all of the newspapers in Russia were placed under the control of a Revolutionary Tribunal of the Press. This took the

place of the courts, and from its decrees no appeal was permitted. It was created by decree of the Executive Committee and not by legislation. It had jurisdiction of any "attempt upon the rights and interests of the revolutionary people." This gave it an enormous, uncontrolled and autocratic power, which it could exercise without any restraint whatsoever, for the suppression of all unfavorable comments in the newspapers.

This was followed by a decree that no advertisements of any kind were to be published except in official journals. This, of course, made it impossible to maintain any independent newspaper. It is not surprising that, in one province, out of 254 journals, 247 were thus suppressed.

In addition to this the sale of newspapers was nationalized so that nobody could purchase newspapers for sale except from government agents.

Meetings and communications to the government by petition were held under the strictest control under a penalty of being regarded as counter-revolutionary.

It was decreed that "any person that shall speak against the rule of soviets shall be brought before the Revolutionary Tribunal."

It was also decreed that no information as to the charge should be given and no one allowed to see the prisoners.

POLITICAL POWER UNDER THE BOLSHEVIST RÉGIME

As I have said, according to the theory of Marx and Lenin the class-conscious proletariat consists of the mass of the people who work with their hands and who, under the old system, were employed by the bourgeoisie. They profess to give to all the proletariat equal rights and privileges. As a matter of fact, however, the entire Marxian theory is based upon the dom-

inance of the industrial soviets composed of the proletariat in the large cities, which are compact and easily manipulated bodies. It is obvious from the writings of both Marx and Lenin that their sympathies are with these urban industrial soviets, and that it was largely as a matter of expediency that they extended their system so as to include the soldiers and the poorer peasants. The soldiers composing what is called the "Red Army" are absolutely necessary for the success of the schemes of the Soviet Government. Without force it could not be maintained for a day. Not only do they give to the soldiers the greatest political power but they maintain them and surround them with more material comforts than any other class in the country. With the great mass of agricultural workers, numbering perhaps 135,000,000, neither Marx nor Lenin had any sympathy. Marx is said to have regarded them with little less than contempt, and the present Bolshevik régime has afforded ample evidence that they have taken the peasant into account only because in no other way could they impose their system upon the country. Indeed, it is extremely doubtful whether Lenin himself has any really sympathetic concern for the rights of any part of the proletariat, and evidence is abundant that he thinks, as the ruling classes of the Russia of the Czars themselves thought, that the Russian people can only be governed by an autocratic government. And the government now presided over by Lenin is of a highly centralized and despotic character. While he and his associates describe it as based on the dictatorship of the proletariat, the fact is that it is a dictatorship of a small minority of able, determined and highly trained individuals over the proletariat itself, which it deceives and misleads. We may well believe the statement attributed

to Lenin that from his experience in the establishment of the new government, he found that of every hundred of the Bolsheviks that he had to work with, sixty were imbeciles, thirty-nine were rascals and one was a Bolshevik by conviction.

And how are Lenin and his associates able to impose upon the Russian people the centralized Soviet Government?

This is accomplished chiefly by granting to the Red Army and to the industrial workers in the cities an enormous preponderance of political power. The basis of apportionment of delegates to the provincial soviets which elect delegates to the National Soviet is so arranged that for each vote of the poorer peasantry the factory or industrial worker in the city has eight votes while the soldier has eighty votes; or, to put it in another way, the soldier has one vote, the urban factory or industrial worker one-eighth of a vote and the peasant one-eightieth of a vote. In the All-Russian Congress there is one delegate for every 25,000 of the proletariat living in the cities and only one such delegate for every 125,000 of the peasant proletariat living in the country. No wonder Lenin says:

“If the lands are confiscated, so long as the proletariat rule in the great centers and the political power is handed over to the proletariat, the rest will take care of itself.”

Thus, by bribing the soldiers with political power and personal favoritism, by using the public funds collected by the confiscation of private property for the support of the Red Army, and by multiplying the power of the soviets in the great industrial centers, it has resulted, as Lenin himself has boasted, that the political, industrial and social control of 180,000,000 of people, of which more than 135,000,000 are peasants, has been

turned over to the despotic power of not more than 200,000 industrial workers in the cities.

To this grossly unequal basis of representation there is added a complete exclusion from all political power of the middle and higher classes of the community.

Thus, there are disfranchised and disqualified from holding office all who employ hired labor for profit or who have any income derived without work, private merchants, trade and commercial brokers, ecclesiastics of all kinds, and all persons deprived by any local soviet of their rights as citizens on account of "selfish or dishonorable offenses for the period fixed by the sentence," a device by which a local soviet has the power to deprive a citizen of the right to vote for any capricious reason.

There are also excluded from the right of franchise lawyers, educators, bankers, managers of industry, commercial travelers, experts, accountants, editors, authors and all other persons engaged in occupations classified as non-essential or non-productive. A small farmer who employs a single hired helper is deprived of his vote.

WHY SHOULD AMERICA CONCERN ITSELF WITH BOLSHEVISM?

What has America to do with the settlement of the internal affairs of the Russian people? Have they not the right to establish any government satisfactory to them?

So long as the Russian people confine their governmental activities within their own country, not only under the rules of international law, but also under our long-established policy concerning our relations to foreign countries, we should let the Russian people work out their own salvation.

But the policy of the Soviet Republic is governed by

the Bolsheviks and they make no secret that their governmental operations are not to be confined within the boundaries of Russia.

THE INTERNATIONAL ASPECT OF BOLSHEVISM

Lenin, Trotsky and all of the leaders of the Bolshevik Government declare that Bolshevism cannot be maintained unless all of the rest of the world is made Bolshevik. They have instituted an aggressive campaign among all classes in other countries of the world and are seeking to spread their propaganda for the avowed purpose of overturning all existing governments.

Trotsky says:

“Internationalism in our eyes is not an abstract notion existing only to be betrayed at every moment . . . but an immediately dominant, profoundly practical principle. Permanent, decisive successes are not conceivable for us without an European revolution.”

An appeal by Trotsky, Lenin and Tschitcherin, Commissar for Foreign Affairs, on August 1, 1918, stated that the

“Salvation of the Russian Revolution constitutes a common interest of the proletariat of all countries. Forced to war against Entente capital, which wishes to add new chains to the chains already imposed upon us by Germany, we turn to you with the cry:

“‘Long live the solidarity of the workers of the whole world! Long live the French, English, American and Italian proletariat, together with the Russian! Down with the robbers of International Imperialism! Long live the International Revolution! Long live the peace of the peoples!’”

The constitution of the Soviet Republic adopts a

coat of arms inscribed with these words, "Russian Socialist Federal Soviet Republic. Workers of the World Unite."

The very existence of the Bolshevik Government, professing as it does that it cannot survive unless it brings all the world under its sway, is a menace to mankind in every part of the globe. No organized government can rest without adopting the most efficient defensive measures. Our American Commonwealth is not beyond the reach of the cunning and insidious propaganda which is only too plainly being spread throughout the land.

BOLSHEVISM AND AMERICA

The fundamental principles upon which Bolshevism is based are irreconcilably at war with the Anglo-Saxon idea of civil liberty, because they are predicated upon inequality of opportunity of citizens, deprivation of personal and property rights and cruel and oppressive despotism.

However much we may sympathize with the Russian people, so long as they are forced to tolerate the soviet form of government, their government must of necessity be at war with the social, industrial and political institutions of every other government on earth. The constitution and decrees under which the Executive Committee of the All-Russian Soviet Government acts are themselves in effect a declaration of war against every nation on earth because they assert the necessity of overthrowing every existing government. They preclude diplomatic relations; they compel the expulsion or effective surveillance of so-called diplomatic representatives that the Soviet Republic may send out, and they require the complete suspension of all com-

mercial and financial relations with the government and the people.

WHAT IS MEANT BY AMERICAN DEMOCRACY

From the time when, in 1215, the barons extorted Magna Charta from King John, we have been building up through the development of the English Constitution and by our own Declaration of Independence and Federal Constitution, a social and political system under which the individual citizen enjoys in the highest degree all of the benefits connoted in the term, civil liberty.

By the Declaration of Independence, it is declared that "All men are created equal," meaning that each citizen is entitled to the opportunity enjoyed by every other citizen to engage in any pursuit he may choose, and that all men are "endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. . . ."

By the Constitution the individual is guaranteed by ample provisions against encroachments upon his natural and legal rights. He is guaranteed the right to trial by jury; his freedom of speech and that of the press cannot be abridged; his right to assemble and to petition the government for a redress of grievances is preserved; he is secured against unreasonable searches and seizures; he cannot be deprived of life, liberty or property without due process of law; and his private property cannot be taken for public use without just compensation. An accused person is entitled to be informed of the nature and cause of the accusation and to be confronted with witnesses against him. Cruel

and unusual punishments are not to be inflicted, and all persons are to be assured the equal protection of the laws.

These are some of the rights which have been regarded as the essentials of Anglo-Saxon liberty, and have existed for centuries. The establishment of the system now in force in Russia would practically sweep them all away.

Moreover, the Bolshevik entirely eliminates from his ideology anything corresponding to our love of country or our patriotism. He substitutes for it what he calls the international dictatorship of the proletariat. He says that Bolshevism requires a "United States of Europe" and, in place of the "antiquated national fatherland," a new fatherland of "the Republican Europe, unless the proletariat alone would be enabled to revolutionize and to reorganize the whole world. One axis of the world reorganization of industry is to be the United States of Europe and the other United States of America." The only moral or intellectual sentiment upon which this is based is what the Marxist calls the "class consciousness" of the proletariat, and that sentiment has no moral or intellectual motive except a determination to obtain social, industrial and political power, and to use it for the purpose of complete destruction of the personal and property rights of every other class in the community. It is based upon no elevating or ennobling principle. In its practical application it has led to a cruel and degrading present and it promises nothing but a dismal and hopeless future.

DANGER TO AMERICA

Fortunately the danger of a complete overturning of our institutions is not great. When the horrid monster

of Bolshevism attempts to invade this country it will find itself confronted with a land where eighteen millions of houses are occupied by twenty-one millions of families, where nine million families own their own homes, where twelve million people have deposits in mutual stock or Postal Savings Banks to an aggregate amount of \$6,500,000,000, where 6,500,000 farms have an aggregate value of \$41,000,000,000, and yield an annual product of more than \$8,500,000,000; where schools are maintained at an annual expense of \$650,000,000, with an attendance of more than 20,000,000 children; where 3,000 public libraries have on their shelves more than 75,000,000 books, and where the total wealth of the country, in an advanced state of profitable cultivation, amounts to not less than \$225,000,000,000.

The destructive principle of Bolshevism can never make a substantial breach in such defenses as these, but if not actively combatted it can make progress which will produce widespread disturbance and unrest, and its indirect effect is already doing vast damage to the interests of the people of this country. Early preparedness and a determined policy to exclude the agents of Bolshevism will save us in the future enormous effort, immense expense and much social and industrial unrest.

DANGER FROM INDISCRIMINATING PERSONS

There are in this community many worthy people always ready to seize upon new ideas for the uplifting of the human race. Some of them are not blessed with the power of discrimination and permit their hearts to lead them they know not whither. From such people we hear expressions of sympathy for the Russian people, coupled with statements showing

their ignorance of the real character of the Bolshevik régime. But they leave the impression with those less informed that they have studied the Bolshevik system and that they approve its principles.

I have read statements of American citizens of high intelligence who have visited Russia and have seen in a limited field the operations of the Soviet Government. Sympathizing with the Russian people in their desire to be emancipated from the fearful oppression to which they were subjected under the rule of the Czars they have been only too willing to accept the assurances and the predictions of the soviet leaders that their government would produce an ideal condition.

Such persons as these have returned to this country and have told the people in the magazines and by word of mouth some of the things that they observed. Most of them have failed to perceive that the Soviet Republic is founded on fundamentally vicious principles which are radically at variance with all our preconceived notions of civil liberty and social justice.

Failing to state the case fully, these agitators have by indirection at least given the impression that they approved the principles of the Soviet Republic, and their standing in the community has been such that their statements have tended to do infinite harm. Such people as these add their efforts to the Anarchist, the Bolshevik and the radical Socialist, and all these combined are contributing to a propaganda which is tending to undermine our most cherished social and political institutions and is having the effect of producing widespread unrest among the poor and the ignorant, especially those of foreign birth.

WHAT IS THE REMEDY?

Forceful government repression of Bolshevik propaganda will undoubtedly be necessary. But our democratic institutions are not well adapted to the eradication by such means of agitation even when it is seditious. We must not neglect other defensive measures such as the education of the people as to the character of the Bolshevik movement. No group in the community can be so efficient in conducting such a campaign of education as the League for Political Education. But we must also arouse Congress and state legislatures to enact laws adapted to meet the menace, and urge officers of the state and federal government to enforce them.

LEGAL REMEDIES

In a letter recently written by the Attorney General of the United States to the Senate much interesting information has been furnished to the country.

It appears that his department has a list of sixty thousand radically inclined individuals in this country; that 202 radical newspapers in foreign languages, and 106 of such newspapers in the English language, are published in this country, and that 144 radical newspapers published in foreign countries are distributed to subscribers here. In addition, hundreds of books, pamphlets and other publications receive wide circulation. A wave of radicalism swept over the country after the armistice was signed, as is evidenced by the fact that since that time about fifty radical newspapers have commenced publication. A large number of these papers advise the destruction of our government and urge their readers to prepare for the coming revolution. As many of these papers have no advertising

matter, they are probably supported from outside sources. In addition to written matter we need no assurance from the Attorney General that there is free oral expression of radical views. The need of some kind of repressive measures is thus very evident.

But the condition of the state and federal laws, or the measures taken by public officials for their enforcement, do not seem to be effective.

The Attorney General is of the opinion that an attempt to overthrow our government is not a crime, unless it amounts to treason, rebellion or seditious conspiracy; and that most of the propaganda is not of that character; that the preaching of anarchy and sedition or advising defiance of law is not a crime, and that advising and openly advocating the unlawful obstruction of industry and the unlawful and violent destruction of property is not a crime.

If the Attorney General is correct in this opinion the situation is certainly startling. He recommends, and the President in his last message urged, the passage of a federal statute to cover the situation, but seventy bills for the same purpose were introduced in the last Congress and none was passed. Moreover, the Attorney General does not appear to be sanguine that the federal government can adequately deal with the subject. He urges that Congress recommend to the several states the enactment of similar statutes so that the services of their law-enforcing machinery may be availed of. He says that they have at their command infinitely greater forces than the United States Government for detecting and punishing seditious acts, and cites the case that in New York there are 12,000 policemen and that the District Attorney has a force of 50 prosecuting attorneys. He contrasts this with the fact that under the appropriation granted by Congress to

the Department of Justice the maximum number of men available to the department is limited to 500 for the entire United States.

But is not the protection of the American people against the effects of revolutionary propaganda a matter peculiarly within the proper function of the federal government? And is it not humiliating that the Attorney General is forced to complain that funds are withheld which are necessary for the protection of our fundamental institutions? The annual estimates of appropriations for the federal government amounted to about \$5,000,000,000 for the fiscal year of 1921 of which only about \$150,000,000 were appropriated for the executive (White House and government departments) and the judicial departments. In such an enormous aggregate it would seem that the United States Government could afford to furnish to the Department of Justice, if that department made the request, a sufficient number of assistants for the enforcement of the law to protect American citizens against the invasion of Bolshevism.

The First Amendment of the Federal Constitution prohibits Congress from making a law "abridging the freedom of speech, or of the press." Under this provision the mere holding of an opinion or even expressing it cannot by act of Congress be made a crime except in an extreme case. The advocacy, either orally or in writing, of the overthrow of our government and with the intent of accomplishing that result, may undoubtedly be made a crime by act of Congress. The Attorney General may be right that the existing statutes relating to the subject are not adequate. The question does not seem to have been pushed for decision in the higher courts. But if more legislation is necessary,

Congress should not delay in enacting it and appropriating funds sufficient for its effective execution.

The exceptional character of the Bolshevik menace makes it a matter of national concern. The federal government should primarily attempt to protect us against its insidious effects. We should not be dependent upon state action, and yet where, as in New York State, there already exists an adequate statute, the power of our state government ought to be brought to bear to abate the evil. The New York Anarchy Statute, passed on account of the assassination of President McKinley, is probably sufficient. We hear much of investigations and are startled by disclosures. But there seem to be few prosecutions and few convictions.

DEPORTATION

Prosecution under criminal laws is not the only remedy open to the federal government.

The deportation of objectionable aliens is a remedy much more expeditious in most cases and equally effective.

The immigration laws as amended in 1918 probably do not need to be amended to enable the Department of Labor to deport objectionable aliens. During the war such aliens were deported under the Espionage Act, but that act will probably not be available in time of peace. While under the immigration law the accused is entitled to hearings and to be admitted to bail and may on a writ of *habeas corpus* get his case into the courts, it still remains the fact that vigorous prosecution by the Department of Labor can do much to improve the situation. The administration by that department does not, however, appear to have accomplished substantial results and there is grave ground

for the opinion that in this city the efforts of the Commissioner of Immigration were not at critical times marked by much vigor.

While deportation ought to be an effective remedy, here again the Attorney General complains that Congress refused appropriations to his department and the Department of Labor for the enforcement of the law. The American people are thus made to suffer because of a lack of coördination between the executive and the legislative departments.

Too much publicity cannot be given to this unfortunate situation.

1919
1920

THE LEAGUE OF NATIONS

1921
1922

VI

THE LEAGUE OF NATIONS ¹

THE AMERICAN VIEW

THE belief undoubtedly pervades the mass of the people of the world that now is the time to find a way to prevent war in the future. The feeling is more or less inarticulate, but it is none the less widespread and insistent; and the statesmen in the Peace Council realize that a serious effort must be made to devise some practicable method to give it form and effect.

The United States has been the foremost nation of the earth in promoting the settlement of international disputes by arbitration and the postponement of war during the process. It has seemed strange, therefore, that a definite project for the avoidance of war should have met at first with hesitation and criticism in this country. But this attitude has been much changed by open discussion and the burning out of the fires of partisanship; and the solicitude lest our implication in European affairs should result in an undue surrender of our independence has been largely removed.

By long-established national habit, based on the warnings of Washington and Jefferson against entangling alliances, we have come to attach vital importance to the condition of political isolation which our geographical remoteness has enabled us to maintain. But the present discussion is making it increasingly clear that the wise policy of a century ago is not applicable to the conditions of to-day, first, because through cable communications and quick ocean transportation,

¹ Reprinted from a series of articles published in the *New York Times* of March 24-25, and April 4, 1919.

the United States has become geographically no more remote from the continent of Europe than some of the European nations are distant from each other, and, second, because there no longer exist concerts of powers, offensive and defensive alliances and secret dynastic intrigues, possible only among autocratic sovereigns and entered into, not to avoid war, but to secure supremacy through the use of force.

WASHINGTON'S WARNING

The Farewell Address of Washington was delivered in 1796; the Revolutionary War had ended less than fifteen years before; the French Revolution had overturned French civilization and produced chaos and the Napoleonic wars were beginning; and our own friendly relations with France, based on her generous and decisive assistance in the Revolution, had been seriously threatened. Our chief interest at that time was to create a self-sustaining nation, not dependent upon foreign nations for the continuance of its national existence. Such a thing as the formation of a league of nations to avoid war was far from the thoughts of the nations of the world, and even if it had been attempted there would have been little reason for the newly created American commonwealth to become a party to it.

It was, therefore, obviously true, to use Washington's words, that Europe had "a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combina-

tions and collisions of her friendships or enmities.”

But the situation which Washington thus visualized was totally different from that which now confronts the world. The nations in the Peace Council are not striving to sustain some monarch upon a tottering throne, or to establish the divine right of kings, or to secure a balance of power by transforming the nations of Europe into permanent armed camps, or to compel weak nations to submit to alien and oppressive rulers. On the contrary, the war and the peace negotiations have been a titanic effort to make all governments the real representatives of the people, to prevent military autocracy as a principle of government from ever again arising to threaten the peace of the world, and to preserve modern civilization from the horrors of Anarchy and Bolshevism.

THE NECESSITY FOR MAKING THE LEAGUE A PART OF THE
PEACE TREATY

We still find responsible statesmen who think that this nation has contributed all that it is called upon to do and can now with honor step aside and commit to the European nations the stupendous task of reconstructing the nations of the European continent which have been shattered by the war. But what is the situation? When we went to war with Germany not only our national institutions but also modern Anglo-Saxon civilization were threatened, and we became as vitally involved as any European nation in the defense of Belgian neutrality and the destruction of military autocracy as a principle of government. For these objects of the war we became irrevocably committed to fight to the bitter end, and it was for that that we assumed a national indebtedness far greater than our people had ever before dreamed of creating, and equipped and

transported with miraculous speed an army of two million men to the field of battle, where more than fifty thousand of our young men made the supreme sacrifice and four times as many were grievously wounded.

And we have succeeded in our lofty and unselfish aims. The public opinion of the world, including probably that of the people of the Teutonic nations themselves, condemns forever any disregard of treaty obligations among civilized nations, and military autocracy as a principle of government has been banished forever from the earth. Out of Germany, Austria and Russia, new nations are to be carved and set up upon the principle of self-determination of their people on the basis of race and nationality. The Polish part of Germany, Austria and Russia is to be transformed into a Czechoslovak self-governing state of ten million inhabitants. The democracy of Jugo-Slovakia is to be created in the south out of Austria and Hungary. New boundaries are to be established on race lines in the Balkans. Upon the same principle Roumania is to be enlarged by adding Transylvania and Bessarabia. Constantinople is to be made international, while the Dardanelles are to be an open avenue for all nations. Independent states are to be established in Palestine, Syria, Armenia and Mesopotamia.

Thus, seven new independent European republics and at least four infant but autocratic governments are to be set up in Asia Minor.

But it is too much to expect that the new nations thus created will in their infancy develop a national self-restraint which will save them from border quarrels among themselves, and already we begin to hear of threatened hostilities. Furthermore, it is doubtful whether a German system will emerge from the exist-

ing confusion which can, without the assistance of other nations, preserve order in central Europe or defend itself against the disturbing effects of Anarchy and Bolshevism pressing on its eastern front, although it is to the interest of the world that Germany should have, as soon as possible, a strong and permanent system controlled by the will of the people; for, however oppressive, however medieval, however disturbing to the peace of the world the German system was, at least it effectively maintained domestic stability and order in central Europe, and now that that has been destroyed beyond the hope of restoration the victors are responsible for finding a substitute, or they fail in their duty to humanity. While it is hoped that the interposition of Czecho-Slovakia, a greater Roumania and Jugo-Slovakia, between Germany and Russia, will save Germany and the Western European countries from the destructive influences of Russian unrest, this cannot be assured without the joint action of all the European allies, and without the effective coöperation of the United States.

AMERICA'S RESPONSIBILITY

In this situation this country cannot in honor escape a fair share of responsibility. It would be futile, as it would be dishonorable, for us now to say that the conditions which were exacted from Germany, Austria, Turkey and Bulgaria were no longer the concern of the United States. However much we may have differed as to the extent to which it would have been advisable for us to become involved in European affairs, it became apparent early in the war, not only that the fate of the war-weary European nations depended upon us, but that the struggle was so desperate and the issue so doubtful, that no longer could it be said in the words of

Washington that Europe "has a set of primary interests which to us have none or a very remote relation." On the contrary, there was a common danger, where the situation had little relation to the ordinary friendships and enmities and rivalries of the European nations of the eighteenth or nineteenth century.

It was this situation that led President Wilson on January 8, 1918, to formulate as a basis for peace the Fourteen Points, and while many Americans felt, as I did, that he to an unnecessary extent took the initiative in injecting this country into the internal affairs of the European continent, it was upon the basis of those points (with two exceptions insisted upon by England) that the armistice was agreed to by all of the belligerent powers.

The Fourteen Points, among other things, included a readjustment of the frontiers of Italy, along "clearly recognized lines of nationality," the safeguarding of the peoples of Austria, for the "autonomous development" of the nations which they saw fit to establish (subsequently modified so as to provide for the recognition of a Czecho-Slovak nation and the nationalistic aspiration of the Jugo-Slavs and the restoration of the occupied territories of Roumania, Serbia and Montenegro); free and secure access to the sea to be accorded to Serbia, the relations of the Balkan states to be determined by historically established lines of allegiance and nationality, and international guarantees of political and economic independence and territorial integrity of the Balkan states to be entered into; all the nationalities except those in the Turkish portions of the Ottoman Empire—that is to say, Syria, Palestine, Armenia and Mesopotamia—to be "assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development," and the

Dardanelles to be permanently opened as a free passage to the ships and commerce of all nations under international guarantees; and an independent Polish state composed of territories inhabited by Polish populations with access to the sea "*whose political and economic independence and territorial integrity should be guaranteed by international covenant.*"

On July 4, 1918, the President added the further idea that the combined power of free nations was to be used to "check every invasion of right and serve to make peace and justice the more secure by affording a definite tribunal of opinion to which all must submit and by which every international readjustment that cannot be amicably agreed upon by the peoples directly concerned, shall be sanctioned."

And finally, by Article XIV of the original points it was specifically stated that "*a general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.*"

With history thus made by the inevitable march of events and with the responsibility of this country thus solemnly formulated by the President of the United States as a condition of peace, and accepted by the victorious and the defeated nations alike, how can this country now withdraw from sustaining to the utmost any responsibility which can reasonably be expected of it, to give substantial guarantees for the permanent maintenance of the national structures which are to be brought into being by the treaty of peace?

Not only has the matter become the subject of a solemn covenant on our part, but the people of Europe in their desperation rightly look to this country to save them from Anarchy and Bolshevism. Indeed, it is not

an exaggeration to say that they believe that if we were to withdraw our moral backing and our potential material support, they would be deprived of the chief bulwark protecting them from a threatened destruction of modern Christian civilization and that a league of nations, however mandatory its terms, would be but a "rope of sand."

It is for these reasons that it is necessary not only to provide for a league of nations as a part of the treaty of peace, but also to retain the principles of Article X.

WILL THE LEAGUE SUCCEED?

The chance that a league of nations will accomplish something substantial is enhanced by the epochal happenings of this war. In no previous war have so many nations of the world been engaged on one side or the other. Never have there been so many men called from their peaceful occupations. Never before has there been such a loss of life or such an enormous destruction of property; never so much individual and collective distress and hardship. No previous war has left so many nations on the verge of bankruptcy, which only many years of rehabilitation can remove.

The people of the world are not likely soon to forget these things, or the possibilities of the development in future wars of scientific methods for causing destruction of property and life; and all of these things have combined to produce an aversion to war far deeper than has ever before existed. But that is not all.

For the first time in the history of the world, a situation has been created in which peace is no longer to be dependent upon the will of individual sovereigns or autocratic governments. Practically every nation of the world will from this time forth have a government

representing, in one form or another, the people, and it is they who desire to abolish war as a means of settling disputes. This fact gives confidence that covenants, and even expressions of intention, for the avoidance of war, will not hereafter be regarded as merely the insincere assurances of autocrats trained in the school of diplomatic intrigue, or as the high-sounding but academic expressions of momentary aspirations of good but impotent peace commissioners.

THE CONSTITUTION OF THE LEAGUE

THE PREAMBLE

The object of the signatory powers in adopting the Constitution of the League of Nations is stated in the preamble to be:

“To promote international coöperation and to secure international peace and security.”

This main purpose is to be obtained by (1) “the acceptance of obligations not to resort to war,” (2) “the prescription of open, just and honorable relations between nations,” (3) “the firm establishment of the understandings of international law as the actual rule of conduct among governments,” and (4) “the maintenance of justice and scrupulous respect for all treaty obligations in the dealings of organized people with one another.”

THE COVENANTS

Opponents of the Constitution in its present form have based their objections chiefly on Articles VIII, X, XII, XIII, XV and XVI, and there is considerable misunderstanding as to the substance and effect of those

articles. If, however, the rule of construction usually applied to treaties is adopted, the meaning and effect of the covenants becomes sufficiently clear. In spite of considerable prolixity of style and some involved sentences, due probably to inserting amendments in the original draft without sufficient attention to literary modeling, any ambiguity that remains after such construction is not so serious as to be a menace to the vital interests of the United States.

As the purpose of the League is expressed to be the security and peace of the world, a meaning tending to produce a different result is not to be adopted unless the words used make it necessary.

As Elihu Root, Henry Cabot Lodge and George Turner said in the Alaskan boundary arbitration in 1903: "We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction and that any other is impossible." (Sen. Doc. No. 162, 58th Congress, Second Session, I, 53.)

ARTICLES VIII AND IX

Article VIII provides for "the reduction of national armaments to the lowest point consistent with national safety." It requires the Executive Council to "*determine for the consideration and action of the several governments* what military equipment and armament is fair and reasonable in proportion to the scale of forces laid down in the program of disarmament; and

these limits, *when adopted*, shall not be exceeded without the permission of the Executive Council."

Thus, the determination of the Executive Council as to the proportion of each state's reduction is to be only "for the consideration and action" of that state, and any limitation imposed does not become binding until "adopted" by such state. The whole arrangement depends upon the good faith of the high contracting parties, and there is not even a moral obligation on the part of any state to "adopt" a limitation which is not "consistent with national safety and the enforcement by common action of international obligations," or which does not give fair consideration to "the geographical situation and circumstances of each state." These are matters which would necessarily have to be determined by each state largely for itself, but in a spirit which is "fair and reasonable" in view of the general intent of the treaty.

Several desirable amendments of Articles VIII and IX have been proposed. One is that the Executive Council of the League shall, every five years, reëxamine the limitation of armament proposed, and make recommendations as in the first instance. This amendment is advisable, although it is doubtful whether it is necessary.

Mr. Root has suggested that the commission constituted under Article IX "shall have full power of inspection and verification . . . as to armament, equipment, munitions and industries referred to in Article VIII." If this power is not to be implied from the provisions of Article VIII, the amendment ought to be made, although it may be objected to because it would imply that the member nations may not act in good faith.

ARTICLE X

This article is as follows:

“The high contracting parties shall undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all states members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Executive Council shall advise upon the means by which the obligation shall be fulfilled.”

Senator Knox says that this article contemplates the sending of our troops to some distant part of the earth to settle a controversy in which we might have a very remote interest. It is also said that it destroys the force of the Monroe Doctrine. But in reality the article is no more nor less than a declaration of the application of a kind of Monroe Doctrine to all of the member nations; and in seeking its effect it is useful to observe how the Monroe Doctrine works out in practice.

THE MONROE DOCTRINE

This doctrine embodies what is essentially a defensive principle; that is to say, it seeks to prevent such interference with nations in this hemisphere as would tend ultimately to result in the establishment of governmental systems based on principles in conflict with those upon which the American Commonwealth is founded. It does not exclude offensive measures by European or Asiatic nations to correct the international manners or to enforce the substantial obligations of nations in this hemisphere, provided such measures do not extend or threaten to extend so far as to interfere with established territorial boundaries or existing political institutions.

This aspect of the doctrine was shown when this country refused to interfere to protect Chile from Spain and announced that the United States would not prevent a foreign nation from punishing an American nation even to the extent of war, provided the aggression was not for the purpose of changing territorial boundaries or overthrowing the sovereignty of the American nation. President Roosevelt, in the Venezuelan matter, also limited the doctrine so as to permit foreign nations to collect by force debts owing by American nations. The Monroe Doctrine seeks only to prevent the nations of the world from increasing their present possessions in the Western Hemisphere "through war or purchase or intrigue" or from acquiring additional "political power or strategical opportunity" at the expense of existing nations of the Western Hemisphere.

Article X prescribes for all the nations of the world a defensive policy similar to the Monroe Doctrine as thus understood. It provides that the high contracting parties shall undertake "to respect and preserve *as against external aggression* the territorial integrity and existing political independence" of member states. Unless the "external aggression" shall have been preceded by submission to arbitration under Article XIII, or by mediation under Article XV, it would amount to a resort to war in violation of Article XII, and that would immediately make applicable the penalty of boycott under Article XVI.

But even if the guarantee does impose upon all the members of the League the necessity of adopting at once effective military measures to prevent "external aggression," our experience with the Monroe Doctrine shows that such measures would not necessarily be taken until the aggression had gone far enough to

demonstrate that it was directed at "the territorial integrity and existing political independence" of the state affected. It will be remembered that in the case of Mexico this country contented itself with diplomatic protests until there had been a military invasion of Mexico and Maximilian had been proclaimed emperor.

EXTENT OF THE OBLIGATION IMPOSED BY ARTICLE X

In case an obligation arose to aid a signatory nation against "external aggression" the extent of such aid would have to be *advised upon*, but not *determined*, by the unanimous vote of the Executive Council. Any recommendation imposing upon the United States an unreasonable burden could be vetoed by its single vote; and as a practical matter the burden of military measures would undoubtedly fall upon the nations which, by reason of geographical proximity and vital national interests, were most directly affected by the threatened aggression.

It is true that in the present form of Article X, and if unanimity is not required in the Executive Council, an "external aggression" upon one of the nations in the Western Hemisphere might lead to the intervention of some European or Asiatic nation. But that would be highly improbable. Neither European nor Asiatic nations would care to concern themselves with the affairs of the Western Hemisphere, and would be only too willing to permit the United States to continue to carry out its traditional policy.

PROPOSED MODIFICATION OF ARTICLE X

To avoid possible controversy, and to make a reservation which would probably be a sufficient protection of the Monroe Doctrine, it would be wise to amend Article X by making a provision similar to that con-

tained in Article XIX with reference to the tutelage of weak nations, to the effect that the primary responsibility for measures to prevent "external aggression" in violation of Article X should rest upon nations which, on account of the "geographical situation of the territory, its economic conditions and other similar circumstances," as well as their own vital national interests, are most directly concerned. Such a provision would leave no doubt that in the case of an "external aggression" upon a country of the Western Hemisphere the United States would be the nation which would be first looked to to take suitable steps, military or otherwise, to make the guarantee of Article X effective, and in so doing they would be acting in conformity with the principle of the Monroe Doctrine. It would also then be plain that, in accordance with the Lansing-Ishii notes of November, 1917, in the event of an external aggression affecting China, Japan would be first expected to adopt appropriate measures for maintaining the "independence or territorial integrity of China." And likewise it would result that in the event of an aggression upon an European nation defensive measures would be committed primarily to the European nations directly affected.

It would, of course, be preferable, if the diplomatic situation makes it possible, that there should be an express reservation inserted in the covenant that the traditional American policy embodied in the Monroe Doctrine was not intended to be affected. It may be difficult, however, to obtain such a broad reservation, since it would evoke from Japan, Great Britain, France and Italy a demand for some specific reservation concerning their relation to countries within the areas of their influence, and that would lead to complications. That the Peace Council does not intend to impair the

strength of the Monroe Doctrine is indicated in the words of Lord Robert Cecil, who had more to do with drawing the Constitution of the League than any other member of the Peace Council. He says that "if the Monroe Doctrine means, as I believe it does, that there ought to be no interference with affairs on the American continent by European powers without the consent of the United States, then I say that the doctrine is strengthened by the League of Nations."

While Article X, modified in the manner suggested, would still impose upon all of the high contracting powers an ultimate responsibility for the enforcement of the guarantee against "external aggression," the possibility that the United States would be called upon to furnish a military force in any part of the world except the Western Hemisphere would be very remote, and such contingency is not to be anticipated if the covenants of the League are to be carried out in the spirit indicated in the preamble.

OTHER OBJECTIONS TO ARTICLE X

It has been urged that Article X is too rigid because it preserves against external aggression the territorial integrity and political independence of *every* member state. But the guarantee is only against "external aggression," and that, of course, implies that it is by hostile attack of the nation upon whom the aggression is committed. It would not prevent any two contiguous nations from changing their boundaries through purchase or cession, nor does it prevent a change in the political independence of a nation, provided such change is made by the consent of its people.

It is also objected that Article X applies to contingencies that cannot be foreseen. But if such a test

were applied it would exclude any provision similar to Article X. The article is intended to apply to all cases where one nation makes an attack upon the territory or the independence of another nation, and if the purpose of the League is borne in mind it is difficult to imagine a case where it would not be consonant with that purpose to prevent external aggression. If the article is amended by providing that any military force which is needed in the first instance shall be furnished by the nation whose territory is nearest to the point of attack, or whose national interest is most directly involved, thus saving any possible invasion of the Monroe Doctrine, no reasonable objection can be made to it.

Article X is one of the most beneficent provisions of the covenants, and it is absolutely necessary if we are to discharge the responsibility which has been cast upon us as a nation and the new peace treaty is to be anything more than a mere paper compact without substantial sanctions.

ARTICLE XII

This article is of the utmost importance because it binds all the high contracting parties that "they will in no case resort to war" until three months after an award by arbitration under Article XIII, or a recommendation upon a mediation under Article XV, and that they will not even then resort to war as against a member nation which complies with the award upon arbitration under Article XIII, or with the recommendation of the Executive Council upon a mediation under Article XV. The penalty of a boycott for a violation of this covenant, prescribed by Article XVI, will probably result in strict observance of the covenant itself. The effect of the delay will in most cases

be the abandonment of all idea of war. This has not been sufficiently emphasized.

The time during which war could be suspended under Article XII is, (1) a reasonable time during which the arbitrators under Article XIII are deliberating and three months thereafter, or (2) in the case of mediation under Article XV, not exceeding nine months after the submission of the dispute.

ARTICLE XIII

This article provides for the arbitration of a matter in dispute. The member nations, however, are only bound to submit to arbitration such matters as "they recognize to be suitable for submission to arbitration." If in good faith they regard a matter as being of a character not suitable for arbitration, as, for instance, where vital national interests are involved, or the subject matter of the dispute is not intrinsically justiciable, they are not bound to arbitrate. Practically Article XIII in many cases will give to the member nations the option of submitting to arbitration or of accepting mediation under Article XV.

ARTICLE XV

By this article the high contracting parties covenant that a dispute not submitted to arbitration under Article XIII shall be referred for mediation to the Executive Council (or, at the option of a party, to the Body of Delegates), which (1) may settle the dispute, in which case a statement of the terms of settlement shall be published, or (2) shall, if a settlement is not made, publish its recommendation as to what it thinks "just and proper for the settlement of the dispute." If the report containing the recommendation is "unanimously agreed to by the members of the Council other than the

parties to the dispute" the parties to the dispute agree, as pointed out above, "that they will not go to war with any party which complies with the recommendations," whatever such recommendations may be. If a unanimous report cannot be made, the majority of the Council is required, and the minority is permitted, to issue statements, indicating their findings of fact and their reasons for their conclusions.

While under Article XIII there is an express covenant that the high contracting parties "will carry out in full good faith any award that may be rendered," and under Article XV that "they will not go to war with any party which complies" with the unanimous recommendation of the Council, there is no definite penalty prescribed for a failure to fulfill these obligations, since under Article XIII, for a failure to carry out an award, the Executive Council is only to "*propose* what steps can best be taken to give effect" to an award, and under Article XV, for a violation of the stipulation not to go to war, the Executive Council has no duty except to "*propose* measures necessary to give effect to the recommendations."

The duty conferred upon the Executive Council by these provisions is clearly advisory, and final action can only be taken upon the unanimous vote of the Body of Delegates, and even that body has no authority to compel the signatory powers to enforce obedience by war. At most, the default of a high contracting party would amount to a renunciation of the treaty, which would make the recalcitrant an outcast nation, and, if it did not voluntarily retire, would undoubtedly make it subject to a decree of expulsion from the League. But the Executive Council might recommend to the Body of Delegates a modified form of punishment leading to some adjustment, and it is probable that under

the provisions referred to, it was contemplated that the Executive Council would propose remedies for recalcitrancy, varying according to the circumstances of each case. While a compulsory remedy for a breach of the covenant to carry out the award or the recommendation is not provided in Articles XIII and XV, it is quite clear that the moral effect of their provisions will be such as to make them entirely effective in the vast majority of cases.

Furthermore, it is to be remembered that the main purpose of the Constitution of the League is not compulsory arbitration, but the avoidance of war, and the penal provisions, particularly those of Article XVI, are directed to that end. If the Executive Council should deem the boycott provided for in the first paragraph of Article XVI as an appropriate remedy to enforce a compliance with an award under Article XIII, or a recommendation under Article XV, it could, of course, recommend that that coercive measure be adopted, thus assimilating the remedy to that specifically provided for a violation of Article XII.

ARTICLE XVI

This article is of the utmost importance, because it provides for affirmative and drastic measures to secure compliance with the covenant to suspend war. As has been seen, the member states agree by Article XII that they will not resort to war until three months after the disputes have been arbitrated under Article XIII or until nine months after submission to mediation under Article XV. It is declared by Article XVI that a high contracting party committing a breach of this covenant "shall thereby *ipso facto* be deemed to have committed an act of war against all the other members of the League." The immediate remedy, however, is

a boycott against the outlaw nation, by which they will immediately subject it "to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a member of the League or not." This boycott is to go into effect immediately and it will no doubt produce such an isolation of the offending nation, and such damage to its material interests, that a resort to war for a more complete punishment will be a very remote possibility.

Whether war shall be resorted to is entirely optional with the nation members of the League. Upon this point there has been much misunderstanding through inattention to the express provisions of Article XVI. The second sentence of that article provides as follows:

"It shall be the duty of the Executive Council in such case to recommend what effective military or naval force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

The use of the word "recommend" in this provision is significant. It clearly does not import compulsion, and certainly not in the absence of unanimous action on the part of the Executive Council and of the Body of Delegates. If such unanimity is not to be implied from the present provisions of the Constitution, probably the Peace Conference will adopt an amendment to that effect, which I have reason to believe is being urged upon them. Military or naval measures should in the first instance, as in the case of an aggression provided for in Article X, be undertaken by the member

nation best fitted therefor through territorial proximity or national interest, and a provision to that effect should also, and probably will, be added to the second sentence of Article XVI.

While it seems quite clear that in its present form Article XVI will not impose upon a member nation the obligation, in the words of Senator Knox, "to go to war when and in the manner the Executive Council determines" or to "fly to arms to protect the covenants," it would probably be wise by the changes suggested to allay the fears which have been aroused by statements made by opponents of the League.

Article XVI also provides that mutual financial and economic support shall be furnished by nation members in making the penalty of the first paragraph of the article effective, and that in case of military measures nation members will permit the forces of any of the high contracting parties to pass through their territory.

ARTICLE XVII

This article is designed to bring to bear upon the states which do not become members of the League the coercive effect of the covenants so as to prevent disputes among them from leading to war. It provides for cases of dispute between a member and a non-member and between states which are non-members. For the sole purpose of the settlement of the dispute, non-members are invited to become members of the League, and upon the acceptance of such invitation an investigation and a recommendation are made by the Executive Council. In case a non-member state refuses to accept the invitation and thus to subject itself to the provisions of Article XII postponing the commencement of war, the member nations agree to apply to the refusing state the boycott provided for in the

first paragraph of Article XVI. Thus the drastic measures of that article will be resorted to for the purpose of preventing war, not alone among members of the League, but also among all the nations of the earth. Article XVII also provides that where two non-members refuse to accept the invitation to assume the obligations of membership for the purposes of the dispute, the Executive Council may take such action and make such recommendations as will prevent hostilities and result in the settlement of the dispute.

PROPOSED CHANGES OF THE CONSTITUTION

The adoption of the changes in the Constitution proposed above would not imply a disapproval of the fundamental principles of the League. The changes will only tend to remove possible misunderstandings and to allay fears. They may be summed up as follows:

(1) An express provision requiring unanimity on the part of the Executive Council, except where otherwise expressly provided. Since the Constitution is nothing but a treaty (this fact does not seem to be generally understood), unanimity to authorize any kind of action would probably be presumed, but there can be no objection to removing all doubt;

(2) Article X should be amended so as to safeguard the Monroe Doctrine by providing that where military force is necessary it should be furnished by the nation best fitted for the purpose through geographical proximity or national interest. From the standpoint of this country's interest it would also be desirable to have the Monroe Doctrine expressly recognized, and there is good reason to believe that it will be;

(3) Provision (probably unnecessary) should be made for the withdrawal of any member of the League

after some fixed period and upon some reasonable notice;

(4) The limits of armament adopted by the nations should be reëxamined after some period, say five years;

(5) Perhaps there should be a reassuring expression of opinion that matters of domestic jurisdiction and polity according to international law are not intended to be affected by the covenants.

It would not be objectionable, and from the standpoint of this country would be desirable, if Senator Lodge's suggestions concerning the tariff and immigration could be adopted in some form, although in my view of the character of the treaty-making power the reservation is not necessary. It would serve the purpose, however, of allaying apprehensions on the part of patriotic Americans who have "reverence for the laws ourselves have made," and I cannot see how it would be objectionable to the other nations. Some general phrase could be inserted substantially to the effect that it was not the intention to vest in the Executive Council, or the Body of Delegates, power to deal with any question which, under rules of international law, is within the domestic jurisdiction and polity of the member states.

STYLE OF THE CONSTITUTION

Except for actual omissions, the chief defects of the Constitution are prolixity and involved style. But treaties are not statutes, and they have always contained expressions of intention, good will and sentiment, and have adopted a phraseology quite different from that deemed necessary in statutes. As there is no Supreme Court for their enforcement, they are based on good faith, and this has led to some laxity

in forms of expression. The statements concerning the ambiguities of the Constitution of the League are somewhat exaggerated, however, and I do not believe that a Secretary of State would have difficulty in interpreting it in a manner which would avoid serious prejudice to this country. But we are assured that the Constitution is to be thoroughly revised, and all ambiguities eliminated.

POWERS OF THE EXECUTIVE COUNCIL

The basis for most of the attacks upon the Constitution of the League has been found in statements made by Senator Knox in his speech in the Senate on March 1. He concludes that "war is mandatory" under Article X, Article XII and Article XVII. As to all these cases he says:

"And in all these three cases, whether or not we participate, the amount of our participation in the belligerent operations is determined not by ourselves but the Executive Council, in which we have seemingly at most but one voice out of nine. No matter what we think of the merits of the controversy, no matter how we view the wisdom of a war over the cause, we are bound by this covenant to go to war when and in the manner the Executive Council determines."

It sufficiently appears from what has been said above that there is no reasonable ground for these statements. While the Executive Council has a variety of duties, in the main they are advisory, and its decisions are obviously provided for on account of their expected moral effect. Its powers and duties may be summed up as follows:

(1) It determines upon the program of disarmament, but only "for the consideration and action of

the several governments," and the limitations become effective only when adopted by the nations, though they are not to be removed without the consent of the Executive Council;

(2) It advises upon the means by which its obligation under Article X shall be fulfilled;

(3) It formulates plans for the establishment of a Permanent Court of International Justice;

(4) It acts as a mediator under Article XV; and also proposes measures to give effect to its recommendations;

(5) It recommends the military forces that members of the League shall contribute under Article XVI;

(6) It acts as a mediator in disputes between non-members of the League, and is authorized to take action and make recommendations for the prevention of hostilities;

(7) If the high contracting parties shall fail to act, it is to define explicitly the degree of authority, control or administration to be exercised by a mandatory state.

These are the principal functions vested in the Executive Council, and unless we give to the words "recommend," "advise" and "propose" a meaning equivalent to "order" and "direct," there is no foundation for Senator Knox's statement that the Constitution creates a "supercovenant," or that the Executive Council is, in his words, "legislature, court and, in large part, executive all in one." The only real power conferred upon the council is that of a veto upon an increase of armament, and the provision dealing with

that subject will probably be amended so as to provide that after some fixed period a nation may apply to the Body of Delegates from time to time to modify the limitation.

CONSTITUTIONALITY

Mr. Knox contends that the covenants of the League are in violation of the Federal Constitution (1) in that they place the power of declaring war in the hands of the Executive Council; (2) because the limit of armament, when adopted by the several governments, cannot be exceeded without the permission of the Executive Council; (3) because no treaty made by this country will become binding until it has become registered with the Secretary General of the League; (4) in that situations might arise under Article XVI relating to financial and economic measures for the support of other members of the League calling for unconstitutional action by this government; and (5) in that under Article XX freedom of transit and equitable treatment of commerce stipulated for, might require the making of laws which Congress ought not to make, and yet if it did not make them it might find itself in a position where the omission to make them would bring on war.

If there is anything in Mr. Knox's constitutional objections, similar objections may be made to most of the treaties to which this country has been a party since the foundation of the government. He fails to give due consideration to the peculiar character under our Constitution of the treaty-making power.

The provisions of the Federal Constitution relating to treaties were the subject of fervid controversy in the discussions in the Constitutional Convention of 1787; and since that time the attempt to make the House of Representatives a potential agency in the negotiation

of treaties with foreign countries has been repeated many times, but without success. Few treaties have been made which have been self-executing, that is, enforceable without supplementary action by the House of Representatives in the appropriation of money or in some other strictly legislative act. The fact that such legislation is necessary, however, does not render a treaty unconstitutional.

George Mason and Gouverneur Morris vigorously objected in the Constitutional Convention of 1787 to making the treaty power independent of the legislative power, urging that no treaty should be "binding on the United States which is not ratified by law"; and James Wilson urged that "as treaties are to have the operation of laws, they ought to have the sanction of laws also." But all such objections were overruled, and Article VI of the Constitution was made to provide that treaties made by the President by and with the advice and consent of the Senate should be "the supreme law of the land."

Hamilton argued that the making of treaties was neither an executive nor a legislative function, adding, "It relates neither to the execution of the subsisting laws nor to the enactment of new ones, but still less to an exercise of the common strength. Its objects are contracts with foreign nations which have the force of law but derive it from the obligations of good faith." (*Federalist* No. 75 [74].) In his letters to Washington (*Crandall's Treaties*, p. 170) Hamilton also said that it was "one thing that a treaty pledging the faith of the nation should by force of moral duty oblige the legislative will to carry it into effect" and "quite another that it should be itself a law." He called attention to the fact that treaties common among na-

tions included indemnification, pecuniary or otherwise, stipulations for the union of military forces, and the furnishing of pecuniary or other aid, and the regulation of external commerce, and unless the treaty power could embrace such objects, "it would even be inadequate for mere treaties of peace, and always so for treaties of alliance and of commerce." The Constitution provides no method of compelling the House of Representatives to act, but a legal discretion to refuse the execution of a treaty is virtually a power to repeal it. Hence Hamilton concludes "that the House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution, because it pledges the public faith; and have no legal power to refuse its execution because it is a law—unless at least it ceases to be a law by regular act of revocation of the competent authority."

In 1792 Mr. Jefferson negotiated a treaty with Algiers which required the payment of money and was asked by President Washington whether he should not wait until the treaty had been ratified by both houses of Congress. Jefferson expressed the opinion that the ratification by the House of Representatives was not necessary, but said that it "might be incautious to commit himself by a ratification with a foreign nation where he might be left in the lurch in the execution." (Vol. I, *Writings of Thomas Jefferson*, p. 216.) Washington declined to wait, saying that if Congress would not do "what the Constitution called on them to do, the government would be at an end, and must then assume another form." Subsequently, in 1796, the House of Representatives requested President Washington to lay before it a copy of the instructions to the Minister of the United States who negotiated

the Jay treaty with Great Britain, together with the correspondence and other documents relative thereto. He declined to comply with the request, saying:

“It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them *we* have declared and *they* have believed that when ratified by the President, with the advice and consent of the Senate, they became obligatory. In this construction of the Constitution, every House of Representatives has heretofore acquiesced and until the present time not a doubt or suspicion has appeared to my knowledge that this construction was not the true one; nay, they have more than acquiesced, for till now, without controverting the obligation of such treaties, they have made all the requisite provisions for carrying them into effect.”

He added that “it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved.”

Chief Justice Ellsworth, who had been a member of the Constitutional Convention, expressed a similar view, after his appointment as Chief Justice of the United States, saying that the obligation to carry out the provisions of a treaty “is as indispensable as it is to appropriate for the President’s salary or that of the Judges, or in any other cases where fidelity to the Constitution does not leave an option to refuse.”

This view of the treaty-making power under the Constitution has always been adhered to and has received the sanction of the Supreme Court. In *Foster v. Neilson*, Chief Justice Marshall said: “Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative

provision." In *Geofroy v. Riggs*, Mr. Justice Field said: "The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

It is true that if a treaty and an act of Congress are "inconsistent the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing." Field, J., in *Whitney v. Robertson*, 124 U. S., 190, 194; *United States v. Lee Yen Tai*, 185 U. S., 213, 220. But any question as to carrying treaties into effect has rarely arisen, since the House of Representatives has almost uniformly recognized the broad sweep of the treaty-making power and has promptly acted to enable the nation honorably to perform its treaty obligations. The matter has never been presented with reference to an obligation assumed in a treaty to levy war, but it may be safely asserted that the principle applicable to that situation would not be different from that applying to any other legislative power requiring for its exercise the action of the House of Representatives.

It would be impossible in most cases to ascertain, before making a treaty, whether Congress would do what might be necessary to make it effective, as, for

instance, would make good a guarantee such as that given in the case of the Nicaragua Canal, or would reduce the naval forces on the Great Lakes, as required by our treaty with Great Britain. In a multitude of treaties the United States has made covenants contemplating performance during a long period of time. In such cases it would be impossible to tell how some future Congress might act; indeed, one Congress might be willing to do what a succeeding Congress would refuse to do. Whether the matter relates to the appropriation of money or to the declaration of war, the question must be decided by the Congress in office at the time when a situation arises requiring action. Under our Constitution that is inevitable, and practically amounts to this, that when the President and the Senate agree upon a treaty it is impossible that they shall have the assurance in advance that a House of Representatives in office will do what is necessary to carry the treaty into effect in accordance with its terms; and it has never been the custom to consult the House.

NATIONAL SOVEREIGNTY

Precisely what is meant by the assertion that the League involves an impairment of national sovereignty it is difficult to understand. It has no possible foundation, except in the mistaken assumption that the Executive Council practically is given the power to make war and to enforce a boycott under Article XVI, and that the United States is in such minority in the Council that the delegation of power amounts to an abdication of sovereignty in what may prove to be vital national matters. But it is to be borne in mind that a treaty is a bargain with another country, in which the idea of sovereignty becomes more theoretical than real, since the interest of the people of a nation requires

their government in every treaty to limit their freedom of action. In consideration of benefits obtained by each nation, it makes concessions which are a restriction upon its sovereign rights.

Sir Frederick Pollock, a very high authority, holds that there can be no undue encroachment upon sovereignty by a treaty unless its restraints are "unreasonable or excessive, having regard to the importance of the end to be attained." He points out that the later arbitration treaties (such as the Bryan treaties for the promotion of peace) do not exclude even questions of "honor, independence or vital interests"; and he adds that if the nations making such treaties "have thereby ceased to be independent it would seem that independence is a kind of legal fiction hardly worth preserving, like the absolute and indivisible sovereignty of certain publicists, which unfortunately for their doctrine, it is impossible to find in the government of the United States, or in any Federal Constitution. If great powers may without undue derogation enter into covenants one with another to refer their disputes to arbitration or the award of a court, why is it a derogation to enter into one comprehensive agreement to the same effect, guaranteed by the joint strength of them all? . . . There is ample precedent for such undertakings in defined spheres of international affairs and traffic, the Postal Union, for example. Every member of that union has renounced its power, as regards all other members, of fixing rates of foreign postage at its own will and pleasure."

And as to the delegation of power to declare war the distinguished author adds that "*the real question is whether the security for the common peace to be gained by the establishment of a common power is worth its price.*"

There is no limit in the Constitution of the United States upon the extent to which this country can by treaty limit its sovereignty, except that it may not change the form of government of the United States or part with territory belonging to one of the states without the consent of that state.

It is clear that the treaty-making power extends to agreements to make or refrain from making war, to levy a commercial boycott, to submit disputes to compulsory arbitration, to guarantee protection to the territory of another nation, and to adopt offensive or defensive measures looking to a state of war. All such agreements, of course, materially detract from the theoretical sovereignty of a nation, but they are, nevertheless, clearly within the treaty-making power.

As early as 1817, by the Rush-Bagot treaty, this country and Great Britain agreed to limit their naval armament upon the lakes forming the boundary between this country and Canada, and that agreement has been continued and respected ever since.

In 1842, by the Webster-Ashburton treaty, Great Britain and this country agreed that they would maintain a naval force on the coast of Africa for the suppression of the slave trade, the forces of the two nations to act in concert and coöperation.

By the Clayton-Bulwer treaty of 1850, between Great Britain and the United States, which related to the subject of a ship canal between the Atlantic and the Pacific oceans, the two countries guaranteed the neutrality of the canal and agreed that if the canal should be undertaken by certain persons, their property should be protected from unjust confiscation, seizure or violence. Every other friendly nation was invited to join in the stipulations. The treaty also declared that neither of the two high contracting parties would

ever "obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same or in the vicinity thereof, or occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any state or people, for the purpose of erecting or maintaining any such fortifications; or of occupying, fortifying or colonizing Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America, or assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy or use any alliance, connection or influence that either may possess with any state or government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

The Clayton-Bulwer treaty also provided that vessels of the two high contracting parties should be exempt, in case of war between them, from blockade, detention or capture. The restrictions upon the sovereignty of the United States by this treaty are so obvious that they need no comment except to say that they have a peculiar significance, in view of the present discussion, because the restrictions relate to a country in the Western Hemisphere, and may be fairly construed as tending to impair the full application of the Monroe Doctrine.

In 1846, by Article 35 of a treaty with Colombia, the United States guaranteed "positively and efficaciously . . . the perfect neutrality" of the Isthmus of Panama. The significance of this provision is that it necessarily involved, in case of a violation of neutrality, the use of armed forces of this country for the performance of its obligations.

By a treaty with Honduras in 1864, the United States guaranteed the neutrality of the Honduras Railroad, and engaged with that country that it should not be seized or confiscated.

By the treaty with Nicaragua, made in 1867, the United States extended its protection to all routes of communication between the Atlantic and Pacific, and guaranteed the "neutrality and innocent use thereof." It was stipulated that military force might be employed, but on the condition only that it should be authorized by Congress.

In 1901, the Panama Canal treaty was made with Great Britain, by which it was provided that the canal could never be blockaded, and that no act of hostility could be committed within it. The principle of neutralization of the canal was recognized.

In 1903, by treaty with Panama, this country guaranteed and agreed to maintain the independence of the republic of Panama.

In 1889, by the treaty with Germany and Great Britain, the signatory powers recognized the neutrality of the Samoan Islands and provided that the three powers should have equal rights within the islands. The three signatory nations undertook a guardianship of the islands similar to that which is contemplated in the proposed Constitution of the League with reference to backward countries.

Within the last half dozen years, the President has

negotiated treaties which were ratified by the Senate, (i.e. the Bryan treaties "For the Advancement of Peace") with Guatemala, Norway, Portugal, Great Britain, Costa Rica, Spain, Sweden, Denmark, France, Uruguay, Peru, Paraguay, Italy, Russia, China, Chile, Ecuador, Honduras, Brazil and Bolivia, in each of which, in practically identical language, we have agreed that disputes arising between this country and the other countries named should be submitted for investigation and report to an International Commission, and that during the progress of such investigation we would not resort to war for the satisfaction of our rights.

The objection of the opponents of the League based on the fact that the power to declare war is vested by the Constitution in Congress would apply to all of these treaties; and, furthermore, the suspension of the exercise of that power is to continue during the period when the dispute is being considered by an international commission, to be selected in such manner that in most cases a majority of the commission will come from nations other than those who are parties to the dispute. In other words, the power of Congress to declare war is suspended, while a commission, composed of members, a majority of whom are not American citizens, is proceeding to determine whether we are right in the dispute. And yet I do not think it has been seriously contended that the Bryan treaties are unconstitutional or unduly detract from the sovereignty of the nation.

Thus it appears that under the treaty-making power, and without the concurrence of Congress, we have made treaties for the reduction of armament, the maintenance of armed forces in foreign territory, the fixing of boundaries, the maintenance of neutrality

of territory belonging to other nations, the guarantee of the independence of other nations, the compulsory arbitration of disputed matters, and the postponement of war during that process, the participation by this country with other countries in the affairs and government of backward nations, a restriction upon the right to erect fortifications for the protection of property in which this country is interested and with reference to which it assumes a responsibility, and an appropriation of money in order to make all such treaties effective. The Constitution of the League of Nations, excepting that it deals in a single treaty with a greater number of nations and a greater variety of subjects, does not require an invasion of the sovereignty of the United States to a greater extent than that involved in the treaties above enumerated; or, if it does, the greater concessions are justified by the lofty and beneficent purpose to insure a lasting and universal peace.

THE NEGOTIATION OF THE TREATY

I agree with Senator Lodge that the President ought to have discussed with the Senate such an important matter as the League of Nations. Although it is in accordance with historical precedent that negotiations with foreign nations should originate through our State Department, and, of course, ultimately be approved by the President, the working arrangement has usually been that the Foreign Affairs Committee of the Senate has been taken into formal or informal conference at an early stage of the proceedings, and, practically speaking, in that way the "advice" of the Senate has been obtained. That ought to have been done in the case of the League of Nations before the President went to Europe the first time. He ought also to have

discussed with the Foreign Affairs Committee of the Senate the League of Nations upon his recent return to this country, and to have invited from them suggestions of changes in the form of the Constitution.

His failure to do any of these things has excited antagonism and has made the controversy now raging much more bitter than it ought to be.

But, however just the criticisms of the President may be in this respect, the situation must be dealt with in a practical way. Senator Lodge suggests that a special session of the Senate be called, and that then the Senate will suggest amendments and send them to Paris. Such course is utterly impracticable now. It is too late. Individual senators should make their specific suggestions as Senator Lodge has now done. The Senate cannot avoid the ultimate responsibility for rejecting the treaty by urging that it should have been permitted as a body to submit amendments at some earlier time.

[REDACTED]

[REDACTED]

[REDACTED]

**SOVEREIGNTY, CONSTITUTIONALITY AND
THE MONROE DOCTRINE**

VII

SOVEREIGNTY, CONSTITUTIONALITY AND THE MONROE DOCTRINE¹

SOVEREIGNTY

EVERY civilized nation must, in the interests of its citizens, make treaties, and, like ordinary trades between individuals, these must be negotiated on the principle of "give and take." Whatever it agrees to do or to refrain from doing imposes a restriction which detracts from its complete sovereignty. But it does not thereby unduly surrender its independence, unless the restriction makes its ordinary governmental functions subject to control by another country, as was the case, for instance, with Cuba, when she accepted the terms of the Platt Amendment, and thereby subjected her national financial policy and her foreign relations to the supervisory control of the United States. A nation's independence is not unduly impaired by a treaty by which it receives advantages which compensate it for what it concedes.

It is too late to argue in this country that international agreements to make or to refrain from making war, to guarantee protection to the territory of other nations and to limit armament, unduly impair a nation's sovereignty; for numerous instances of such agreements in existing treaties will be found in our diplomatic history. Nor can it be said that such agreements were not contemplated when our Constitution

¹ Letters of Mr. Henry W. Taft, reprinted from "The Covenant, An American Exposition of the Covenant of the League of Nations," being a series of letters written by William H. Taft, George W. Wickham, A. Lawrence Lowell and Henry W. Taft, after the Covenant had been revised. (Doubleday, Page & Co., 1919.)

was adopted, for the Supreme Court has held that under the treaty-making power, the President and the Senate may make any agreement they regard as appropriate, provided it does not result in "a change in the character of the government or in that of any of the states or a cession of any portion of the territory of the latter, without its consent."

Article X of the covenant is criticized as involving an impairment of sovereignty. By that article there is created a defensive alliance of the nations of the League to prevent external aggression threatening the territorial integrity or the political independence of any member nation. The alliance is designed primarily to give protection to the seven new republics in Europe and the four autonomous nations in the Near East, created as a result of the war; and the obligation to join in such an alliance was thrown upon us because, by the Fourteen Points on which the armistice was expressly based, we made ourselves responsible not only for the erection of the new states but also for their protection against attacks from without, threatening their status as it was to be established by the treaty of peace. For this we are to receive the further advantage of the continuous coöperation of the League in preserving the peace of the world.

Furthermore, the obligation imposed by Article X will probably be less burdensome than opponents of the League have assumed, for if it were sought to have the Council advise that the United States should intervene in what we regarded as an unsuitable case, we could veto the suggestion by our single vote. But it is altogether improbable that that would be necessary; for in any concrete case it would naturally happen that the burden of performing the guarantee would, in the first instance, fall on the nation nearest at hand or

politically most concerned. The chance that we should often, if ever, be called upon to send troops or warships to Europe or Asia to repel local aggressions would be remote, since in practice they would have to be dealt with summarily by the nations more directly affected, precisely as, under the reservation of the Monroe Doctrine in Article XXI, we would be expected to deal with aggressions upon countries of the Western Hemisphere.

In considering whether we are unduly hampered by Article X "the real question," in the words of Sir Frederick Pollock, an eminent authority on the subject, "is whether the security for the common peace to be gained by the establishment of a common power is worth its price." When we became implicated in the European situation, we committed ourselves to the proposition that the price paid by our becoming a party to the guarantee of Article X was not out of proportion to the security we expected to enjoy in the future. It was in the interest of the people of this country that the United States should become a decisive factor in the world's affairs. We cannot, with national honor, now escape a responsibility corresponding to our contribution to the winning of the war. That is imposed upon us by the dictates of international morality, and no nation can be said unduly to surrender its sovereignty by discharging such an obligation.

The chief purpose of the League is to preserve international peace. It is sought to accomplish this through the reduction of armament (Article VIII), the suspension of war during the process of the settlement of disputes by arbitration or through mediation (Articles XII, XIII and XV), and an economic boycott for a violation of the covenant (Article XVI). In view of

America's past efforts to avoid war by procuring the settlement of disputes by arbitration, even though they involve vital interests or national honor, it seems unnecessary to argue that such a comprehensive scheme for preserving the peace of the world as that worked out in the covenant does not involve an undue surrender of sovereignty. Furthermore, all of the obligations assumed for the beneficent purpose of the League have their counterpart in covenants contained in earlier treaties:

In 1817, by the Rush-Bagot treaty, this country and Great Britain agreed to limit their naval armament upon the lakes forming the boundary between this country and Canada.

By the Webster-Ashburton treaty, Great Britain and this country agreed in 1842 that they would maintain a naval force on the coast of Africa for the suppression of the slave trade.

By the Clayton-Bulwer treaty of 1850, between Great Britain and the United States, the two countries guaranteed the neutrality of any ship canal that might be built between the Atlantic and Pacific, and agreed, among other things, that neither nation would ever "obtain or maintain for itself any exclusive control over the said ship canal," or "erect or maintain any fortifications commanding the same or in the vicinity thereof, or occupy, or fortify, or colonize, or assume, or exercise, any dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America," or "take advantage of any intimacy or use any alliance, connection or influence that either may possess with any state or government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard

to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other." The treaty also provided that vessels of the two high contracting parties should be exempt in case of war between them, from blockade, detention or capture.

In 1846, by Article 35 of a treaty with Colombia, the United States guaranteed "positively and efficaciously . . . the perfect neutrality" of the Isthmus of Panama. In 1901, the Panama Canal treaty was made with Great Britain, by which it was provided that the canal could never be blockaded, and that no act of hostility could be committed within it.

In 1903, this country by treaty guaranteed and agreed to maintain the independence of the republic of Panama.

By a treaty with Honduras in 1864, the United States guaranteed the neutrality of the Honduras Railroad.

In 1889, by treaty with Germany and Great Britain, the signatory powers recognized the neutrality of the Samoan Islands and provided that the three powers should have equal rights within the islands.

By the so-called Bryan treaties "for the advancement of peace" made by the United States with Guatemala, Norway, Portugal, Great Britain, Costa Rica, Spain, Sweden, Denmark, France, Uruguay, Peru, Paraguay, Italy, Russia, China, Chile, Ecuador, Honduras, Brazil and Bolivia, we have, in practically identical language, agreed that disputes arising between this country and the other countries named shall be submitted for investigation and report to an international commission, and that while such investigation is proceeding we will not resort to war for the satisfaction of our rights. Even questions of national honor and vital interest are not excluded. The com-

mission is to be so selected that in most cases a majority of the commission will come from nations other than those who are parties to the dispute. Finally, by the "favored-nation" clauses of our commercial treaties, we have acted on a principle not very different from that underlying the economic boycott provided for in Article XVI.

Thus, under the treaty-making power we have made covenants for the reduction of armament, the maintenance of armed forces in foreign territory, the fixing of boundaries, the maintenance of neutrality of territory belonging to other nations, the guarantee of the independence of other nations, the compulsory arbitration of disputed matters, with the postponement of war during that process, the participation by this country with other countries in the affairs and government of backward nations, a restriction upon the right to erect fortifications for the protection of property in which this country is interested and with reference to which it assumes a responsibility, and an appropriation of money in order to make all such covenants effective. Excepting that it deals in a single treaty with a greater number of nations and a greater variety of subjects, the covenant of the League does not require an invasion of the sovereignty of the United States to a greater extent than that involved in such covenants as these.

Provisions conferring powers upon the Council have been pointed to as an excessive delegation of sovereignty. But the power delegated is no greater than that conferred by the Bryan treaties upon arbitrators, a majority of whom may be foreigners, and it is far less than that by which the members of the Postal Union renounced their important government prerogative of fixing rates of foreign postage. The Council

was necessary for purposes of administration, but it has no power to commit the League. It can only make recommendations and even such advisory action can be prevented by the veto of a single member of the Council.

Finally, the real question is whether the restriction upon sovereignty is justified by the expected result for which it is imposed. No loftier purpose can be sought for by any nation than the maintenance of peaceful relations with other nations, and nothing will so clearly justify for its accomplishment an appropriate surrender of sovereignty. If Articles X, XII, XIII, XV and XVI are effective to that end, it may with truth be said, as Sir Frederick Pollock said of the Bryan treaties, that if they result in undue detraction from our national independence, then such "independence is a kind of legal fiction hardly worth preserving, like the absolute and individual sovereignty of certain publicists, which, unfortunately for their doctrine, it is impossible to find in the Government of the United States, or in any Federal Constitution."

CONSTITUTIONALITY

The Covenant of the League of Nations is a treaty, and the validity of its provisions must, therefore, depend upon the Federal Constitution which confers on the President the "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." As by the same instrument treaties are made "the supreme law of the land," the President and the Senate in making a treaty enact, or at least initiate, what is in the nature of legislation, and they are made the agents of the people for that purpose. But a certain school of pub-

licists have asserted that a treaty dealing with matters requiring supplementary action by Congress, as, for instance, a declaration of war, should expressly provide that it is made subject to action by the House of Representatives, or at least that the House should be consulted before a treaty is agreed to. For a century, however, the President and the Senate, without consulting the House, have been negotiating treaties; and the Supreme Court, whenever the question has arisen, has held that while they could not agree to do what is forbidden by the Constitution, or to make a change in the government of the United States or of one of the states, or to cede the territory of one of the states without its consent, there is not "any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

Most treaties which have been made by the United States would have remained empty pacts without action by Congress. In connection with the present discussion it is pertinent to note that by some of such treaties we have guaranteed the territorial integrity or the political independence of some foreign nation, and have thus committed the nation to war, if necessary, for the enforcement of the guarantee; while by others we have agreed to reduce armament on the Great Lakes, to maintain a naval force on the coast of Africa or to refrain from war during the arbitration of international disputes; and we have frequently made treaties requiring the appropriation of money or some economic legislation by Congress in order to give them effect. But the President and the Senate have never waited in making such treaties for action by Congress; nor, on the other hand, has that branch of the government ever failed to enact necessary legislation.

There would be no constitutional way of compelling Congress to take action, although a legal discretion to refuse to act is virtually a power to abrogate a treaty. Hamilton sums up the matter thus:

“The House of Representatives has no moral power to refuse the execution of a treaty which is not contrary to the Constitution because it pledges the public faith. . . .” And Washington, in a case where the question arose sharply, said that “every House of Representatives has heretofore acquiesced and until the present time not a doubt or suspicion has appeared to my knowledge that this construction was not the true one; nay, they have more than acquiesced, for till now, without controverting the obligation of such treaties, they have made all the requisite provisions for carrying them into effect.”

Suggestions have been made that treaties of such importance as the League of Nations should not be entered into by the President without ascertaining the will of the nation and of the representatives of the people elected to the House of Representatives. But we are a nation governed by a Constitution and there is no way under that instrument for submitting a treaty directly to the people or to Congress for their approval; and if governmental agencies vested with treaty-making powers should attempt to do so, they would be evading the duty clearly imposed upon them by the Constitution.

Furthermore, it would not be possible to ascertain how some future Congress would act. If the sentiments of one Congress could be ascertained, that would be no assurance that the next Congress would be of the same mind. One Congress might be willing to enforce an economic boycott under Article XVI or to take military measures for the performance of the

guarantee of Article X, while another would not assent to such action. Congressional action would, of course, be taken under the circumstances existing when a concrete situation had arisen; and in the vast majority of cases it would be impossible to forecast those circumstances. It would, therefore, be a futile expedient to procure assurances from the Congress that happened for the moment to be in power.

It is quite true that, as the President and Senate always take the initiative in making treaties, Congress, in enacting supplementary legislation to give a treaty effect, acts under a sort of coercion due to the fact that duly constituted governmental agencies have committed the nation to a solemn moral obligation. But this situation is inevitable under the distribution of powers under the Constitution, and it no doubt accounts for the historical fact that Congress has never refused to take appropriate legislative action. It was this phase of the matter that led President Washington, when the House of Representatives sought to investigate the instructions under which the minister of the United States negotiated the Jay treaty, to refuse to send to the House the papers which had been before him when the treaty was signed, and to say:

“It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them *we* have declared and *they* have believed that when ratified by the President with the advice and consent of the Senate they became obligatory.”

THE MONROE DOCTRINE

Article XXI of the revised Covenant of the League provides as follows:

Nothing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing the maintenance of peace.

It is asserted that this article does not adequately reserve the Monroe Doctrine because it is not a "regional understanding" and its purpose is not the "maintenance of peace." It is also objected that, although the Monroe Doctrine is a national policy, any dispute concerning its reservation in Article XXI shall be submitted to the League for arbitration or examination under Articles XIII or XV. The reason for these objections disappears upon an examination of the general purpose of the League and the character and effect of the Monroe Doctrine.

In 1823 a number of South American states, having thrown off the yoke of Spain, had become independent republics. It was believed that the European powers constituting the Holy Alliance were planning to overturn the independence of the new states and by making them colonies of an European state to introduce in this hemisphere the autocratic monarchical principle. It was to frustrate such a design that President Monroe in his annual message to Congress said:

"We should consider any attempt on their part [the part of European powers] to extend their system to any portion of this hemisphere as dangerous to our peace and safety"; and "We could not view any interposition for the purpose of oppressing them [the young American Republics] or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."

The principle of the doctrine thus proclaimed has

been so developed during the last hundred years that it now includes the prohibition of attempts by foreign nations, whether by war or purchase, or diplomatic intrigue, to make territorial acquisitions or establish new strategical footholds upon or near the Western Hemisphere, or to secure political advantage in the domestic affairs of American nations.

The Monroe Doctrine is not a principle of international law. It is a national policy based upon the right of every nation to protect itself against acts tending to embarrass it in preserving its own national interests or political institutions. It is founded upon the same right as the familiar concert of European powers, except that it affects a greater number of nations more widely separated geographically, and is asserted by a single powerful nation able, without the sanction of treaty stipulations, to maintain it. It does not become effective so much by the acquiescence of the American nations subject to its operation as from its recognition by nations of other parts of the world as a political policy which can not be disregarded by them except at the risk of war with the United States. Since the Monroe Doctrine is thus based upon an inherent national right, it is entirely consistent with the principle of mutual self-protection underlying Article X of the Covenant of the League, which seeks to check threatened "external aggression" affecting "the territorial integrity and existing political independence of all members of the League."

While doubtless Article X was designed primarily to give protection to the seven new European republics and the four autonomous nations in the Near East, created under the Treaty of Peace, and probably also to France and Belgium, in its broader aspect it was intended, to use the words of the Preamble of the Cov-



enant, "to achieve international peace and security" by discouraging hostile aggression everywhere; and so far as it prevents an European or an Asiatic nation from interfering with the territorial integrity or the existing political independence of any nation of the Western Hemisphere, it accomplishes in that part of the world precisely the result aimed at by the Monroe Doctrine. And, furthermore, quite independently of the new Article XXI, the United States would undoubtedly be the nation called upon under Article X to repel an aggression upon an American state, because, not only would its political interest be immediately involved, but also because, by reason of territorial proximity, it could most conveniently act.

It is in the light of these effects of Article X that the express recognition of the Monroe Doctrine in Article XXI should be examined.

It is argued that the doctrine itself is inadequately reserved by referring to it as a "regional understanding." It need not be denied that this descriptive phrase was not the best that could have been selected to define the Monroe Doctrine, although the doctrine is "regional" in that it relates to a particular region and is an "understanding" in that it is widely accepted by the nations of the world. Probably the draftsmen of Article XXI, the majority of whom were European statesmen, thought it unwise to attempt to formulate a definition of an American political policy, concerning the limitations of which American statesmen have not always themselves agreed. But the important thing is that the Monroe Doctrine is declared to be "valid," thus rendering its continued existence unaffected by the Covenant; and, as the common understanding in this country of its character and effect is consistent with the principle of the general purpose

of the Covenant, as indicated in Article X and the other articles designed to preserve the peace of the world, it is a far cry to argue that the somewhat inept use of the phrase "regional understandings" indicates that the high contracting parties intended by indirection to raise doubts as to the complete reservation of the doctrine.

No definition of the Monroe Doctrine having official sanction has ever been given except by Presidents or Secretaries of State; and, except in the few concrete cases that have required its application, they have generally contented themselves with describing its historical origin and the general principle on which it is founded. Even the Senate, in ratifying The Hague convention of 1907, and in seeking to reserve the Monroe Doctrine, referred to it as "our traditional attitude toward purely American questions," leaving the character of that "attitude" as much subject to question by the signatories as it had been before the reservation was made. And, although, on the one hand, Secretary Olney in 1895, in the Venezuelan controversy, said: "To-day the United States is practically sovereign on this continent and its fiat is law upon the subjects to which it confines its interposition"; on the other hand, President Roosevelt in 1901 said that the Monroe Doctrine did not prevent foreign nations from collecting by force debts owing by American nations; and in 1866 this country refused to protect Chile when Spain was bombarding her ports, because it would not intervene in wars between European and American states "if they are not pushed . . . to the political point."

These references serve to point out the difficulty of an attempt in any diplomatic document to *define* the Monroe Doctrine.

But however inept it may be to refer to the Monroe

Doctrine as a "regional understanding," Article XXI correctly describes it as "securing the maintenance of peace." It was of the essence of the doctrine that foreign nations should not be permitted to implant among the nations of the Western Hemisphere autocratic principles of government lest they should become a menace to the free institutions of the United States, and we might again have to resort to arms for the maintenance of the principles settled by the Revolution; and in practice the dominance of this country in the affairs of the Western Hemisphere has undoubtedly saved it from repeated exploitation at the hands of European and Asiatic nations. The frequent revolutions in South and Central America, often accompanied by the seizure of power in the name of liberty by disloyal and unscrupulous dictators, would have afforded tempting opportunities to European autocracies, at small expense and by the use of a merely nominal force, to secure a permanent foothold upon this continent, gradually establishing colonies which would have become a menace to our republican institutions, or at least a source of national disquietude. All of this has been prevented without the use in a single instance of military force, by the Monroe Doctrine, which is, therefore, aptly described in Article XXI as "securing the maintenance of peace."

But if the Senate is of the opinion that the use of the words "regional understanding" creates any doubt as to the meaning of Article XXI, it can, in ratifying the treaty, make a declaration that its action is taken under the reservation that the Covenant is to be so construed as to leave the Monroe Doctrine unaffected. In view of the general purpose and effect of the League, referred to above, such a reservation would not be regarded as a substantial amendment of the Covenant.

Upon this point the official commentary of the delegates of Great Britain upon the revised Covenant is particularly pertinent. They refer to the Monroe Doctrine and similar understandings as having "shown themselves in history to be not instruments of national ambition but guarantees of peace," and add:

"The origin of the Monroe Doctrine is well known. It was proclaimed in 1823 to prevent America from becoming a theatre for the intrigues of European absolutism. At first a principle of American foreign *policy*, it has become an international *understanding*, and it is not illegitimate for the people of the United States to ask that the Covenant should recognize this fact.

"In its essence it is consistent with the spirit of the Covenant, and, indeed, the principles of the League as expressed in Article X represent the extension to the whole world of the principles of this doctrine; while, should any dispute as to the meaning of the latter ever arise between the American and the European powers, the League is there to settle it."

This commentary receives especial force from the facts that England had a close historical connection with the proclamation of the Monroe Doctrine in 1823 and that in the Venezuelan dispute the most advanced claim as to the scope of the doctrine was sharply called to her attention. No delegation at the Peace Conference probably understood better than that of Great Britain how the Monroe Doctrine was intended to be affected by Article XXI.

As the "validity" of the Monroe Doctrine is not "affected" by Article XXI, the doctrine is excluded from the operation of the Covenant. If, therefore, a case within the principle of the doctrine should arise it would not be within the jurisdiction of the League. Even if a question whether the doctrine extended to a particular situation should be made the subject of

inquiry under Article XV, there should be little doubt of the result; for, if we except a few cases where doubt has existed as to the applicability of the doctrine, and the belated assertion of President Carranza that it is nonexistent, it is now understood by all the nations of the world.

But it is too late to have forebodings on account of the remote chance that a question concerning the Monroe Doctrine may have to be submitted to arbitration or inquiry under the Covenant; for, by the Bryan treaties, ratified by the Senate in 1914 and 1915, we have already agreed with Great Britain, France, Italy and six other European nations, as well as with Chile, Brazil, Peru and seven other American states, that all disputes of an international character, including those affecting national honor and vital interests, such as the Monroe Doctrine, shall be submitted to an international commission for investigation and report, and that pending such report war will not be declared or hostilities commenced. These treaties are "international engagements" and their validity, within the reservation of Article XXI, is not affected by the Covenant. Under the Bryan treaties, therefore, investigators, a majority of whom are not to be American citizens, would have jurisdiction to consider and report concerning any dispute arising under the Monroe Doctrine; and while the investigation was proceeding this country would be obliged to abstain from enforcing the doctrine, however exigent the situation might be.

Under such circumstances the question whether Article XXI adequately reserves the rights of the United States under our traditional national policy loses much of its importance.



THE TREATY IN THE SENATE

VIII

THE TREATY IN THE SENATE¹

WHY THE PARIS COVENANT CANNOT BE AMENDED WITHOUT POSTPONING THE PEACE THE WORLD NEEDS

IF Section I of the treaty with Germany, being the Covenant of the League, is amended by the Senate, neither the treaty as a whole nor any of its provisions can become effective either to restore peace or for any other purpose until it has been ratified in its amended form by all of the signatory nations.

Late dispatches indicate that the treaty provides that it will become operative when signed by Germany and three of the principal allied powers. Thus, after Germany shall have signed the treaty, Great Britain, France and Japan or Italy, by ratifying it, will immediately be able to enjoy the advantages of a resumption of their commercial activities under peace conditions, while our enjoyment of the same advantages will be delayed until amendments made by the Senate shall have been formally accepted by all of the signatories. Not only would such delay prevent us from engaging in international trade on equal terms with the nations signing the treaty, but our internal trade would continue to be shackled by such things as the fixing of prices of wheat and other commodities, the necessity for obtaining freight and shipping licenses, the activities of the Alien Property Custodian, and other like restrictions, most of which under the law remain effective until a state of peace has been proclaimed by the President.

¹ Paper reprinted from an article published in the *New York Times* of May 30, 1919.

THE WAR CANNOT BE ENDED BY JOINT RESOLUTION BY
CONGRESS

It has been suggested that because Congress has power to declare war it has, by necessary inference, the power to end it by joint resolution. Such a theory is based on an interpretation of the distribution of powers under the Constitution contrary to all precedent, is inadmissible upon any reasonable theory of implied powers, and is contrary to uniform historical practice.

The war has required the regulation, and, to a greater or less extent, the requisitioning of a large part of the industrial and transportation facilities of the nation. Personal and property interests and contract rights of an infinite variety and involving immense sums of money, are governed by special rules of law applicable during a state of war and by numerous special war measures, and these cannot be put on a definite legal peace basis except by a formal treaty. Indeed, some of the war statutes provide that their provisions shall remain effective until the ratification of a treaty of peace, and others until peace shall be proclaimed by the President; and important private contracts frequently provide that their obligations shall, or may, at the option of the parties, be terminated upon such ratification or proclamation. A peace treaty can only be ratified in the constitutional manner, and it is absurd to suppose that the President would proclaim it before such ratification. If Congress should attempt by joint resolution to declare that peace had been restored, such a condition of doubt and confusion concerning a multitude of transactions legally affected by the war would be created, that there would be brought down on the heads of Congressmen such uni-

versal condemnation that we are safe in assuming that the suggestion for such action will never be treated seriously.

HOW AN AMENDMENT TO THE COVENANT WILL AFFECT THE
REST OF THE TREATY

The treaty with Germany is made by the twenty-seven allied and associated nations. It forms a large book, containing fifteen sections or chapters, the first of which is the Covenant of the League of Nations. The Covenant and many of the provisions of the other sections are interdependent.

The much-discussed Article X of the Covenant binds all members to preserve "as against external aggression the territorial integrity and existing political independence of all the members of the League." This article has for its chief purpose the preservation of the seven new European nations and the four autonomous nations in the Near East created by the treaty; and it is the only provision of the treaty which effectively gives to the new governments the sanction of the combined support of all of the signatory nations. Its omission or amendment would make a vital change in sections of the treaty other than that containing the Covenant. Furthermore, by those sections important functions are directly vested in the League.

Thus, the League is to create an international commission which is to govern the Saar Basin for fifteen years, and another under which Danzig is to be governed as a free city. If Germany ultimately buys the mines in the Saar Valley from France, the League is to determine the amount of coal to be sold annually to France. In connection with the neutralized zone east of the Rhine, established by the treaty to protect France and Belgium, the League is to question Ger-

many at any time concerning a violation of neutrality. It is also to act as a final court in relation to the establishment of the Belgian-German frontier and in disputes as to the Kiel Canal. Under its direction, an international conference on labor is to be held in October, and it is also to establish a permanent organization for the international adjustment of labor conditions. For five years, and under conditions of reciprocity thereafter, ships of the allied powers are, unless the League otherwise decides, to enjoy the same rights in German ports as German vessels. Riparian states on the Danube and other international streams are to enjoy advantages in relation to navigation, subject to an appeal to a special tribunal of the League, which may also arrange for a general international waterways convention.

Thus, it will be perceived, the League is to perform functions of a varied, extensive, and highly important character; and it is idle to talk of separating from the rest of the treaty Section I, by which the League is created, or materially amending its provisions, without dislocating the entire scheme of the treaty and necessitating a resumption of the formal peace negotiations.

WHAT THE SENATE MAY DO

The Senate may, of course, consider the Covenant independently of the rest of the treaty. It may make its own position clear by adopting a preliminary resolution approving all the sections except that containing the Covenant, and it may amend the Covenant or any part of the treaty. Such an amendment may even be the entire omission of the Covenant. But the Senate must ultimately take some definite action upon the entire treaty—amended or unamended. If such action

is an approval, it will require a vote of "two-thirds of the senators present," although before such final action specific amendments may be adopted by a majority vote.

But an approval of the treaty, subject to amendments, is not effective to make it operative until in its amended form it is agreed to by all the nations who were the original signatories.

The principle applicable to such case was stated by Justice Brown of the Supreme Court, in interpreting the treaty of peace with Spain. (*The Diamond Rings*, 183 U. S., 176.) He said:

"Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it which shall be obligatory upon the other power, although it may refuse its ratification or make such ratification conditional upon the adoption of amendment to the treaty."

ALTERNATIVES OPEN TO THE SENATE

If the Senate should notify the President that the Covenant was still under consideration, but that the rest of the treaty had been approved, the President would probably wait before communicating with the other signatories until final action upon the Covenant had been taken by the Senate, and if such action was not taken within a reasonable time he would notify them that the treaty had been rejected. If, on the other hand, the Senate should approve the ratification of the treaty subject to an amendment striking out or ma-

terially changing the Covenant, two courses would be open to the President. If he approved the amended treaty, he could advise the other nations that the treaty would be ratified if the amendments were agreed to; and if they were agreed to, the amended treaty would be ratified by the President without further action by the Senate. This was the procedure adopted when the Senate amended the Jay treaty of 1794-95 by suspending the operation of the Twelfth Article relating to the trade between the United States and the English colonies in the West Indies.

If, however, the Senate's amendment should not meet with the approval of the President, he could abandon the treaty. That was done where the Senate so amended the so-called "Taft-Knox" arbitration treaties with France and Great Britain that the President was unwilling to press the negotiations further.

What steps the law and procedure of other nations would require them to take in the event of an approval by the Senate, subject to amendments, need not be fully considered. The formalities would undoubtedly occupy many months and would vary among the numerous signatory nations. Amendments might be agreed upon through the ordinary diplomatic channels; but it is more probable that they would require more formal consideration, and perhaps the reassembling of the peace delegates.

APPROVAL BY THE SENATE WITH A DECLARATION OF ITS
INTERPRETATION OF THE TREATY

It not infrequently happens that doubt arises as to the meaning of some clause of a treaty. It has already arisen with reference to Article XXI of the covenant relating to the Monroe Doctrine. In such a case a res-

olution may be passed by the Senate stating its understanding of the meaning and effect of the doubtful clause.

This is done where a treaty is capable of a double interpretation, or is obscure, or where it fails altogether to mention some matter of vital importance that may be affected. Thus the Senate, in approving the Algeciras Convention of 1906, stated that it understood that the participation of the United States in the conference was not intended to indicate a departure "from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope." Similarly, in the second Hague Convention one reservation made was that nothing the treaty contained was to be "so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with or entangling itself in the political questions of policy or international administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."

Undoubtedly such reservations as these, which do not purport to amend, but only to interpret treaties, do not constitute such a change in the terms of the treaties themselves as to require ratification by the other parties; and when the treaties are ratified, promulgated and acted under, an interpretation so reserved, especially if not seasonably objected to, would with the lapse of time become increasingly difficult to question.

But an expression of the Senate, which, though purporting to be a mere interpretation, seeks to introduce a substantial change, is in fact an amendment. Its

adoption, on principles already referred to, amounts to a disapproval of the treaty and requires its resubmission as amended to the other parties. A case of that kind arose under the Guadalupe-Hidalgo treaty with Mexico in 1848 and was the subject of a controversy in the Senate.

WHAT MAY AND WHAT MAY NOT BE DONE WITH THE
COVENANT IN THE SENATE

Article XXI of the Covenant provides that "Nothing in this Covenant shall be deemed to affect the validity of . . . regional understandings like the Monroe Doctrine for securing the maintenance of peace." If the Senate should approve the treaty, stating that its approval was given upon the understanding that the treaty was not intended to affect any question involving the maintenance of the Monroe Doctrine, the reservation would not affect the force of the approval, for the reason that it would state what undoubtedly was the intended meaning of Article XXI.

If, however, the reservation went to the extent of withholding unconditional assent to Article X of the Covenant and attempted to qualify the obligation imposed by that article by either specifying a limited set of circumstances in which it should apply, or by limiting the period during which it should be effective, it clearly would be an amendment of the covenant itself in a vital and important particular.

Mr. Root's proposed amendment of the covenant, providing for compulsory arbitration and a conference for the purpose of dealing with the principles of international law, would also undoubtedly constitute an amendment of the treaty requiring a reopening of negotiations. But his reservation as to the "traditional attitude toward purely American questions," so

far as it is intended to reserve any question affected by the Monroe Doctrine, probably would not be regarded as a material amendment, but only as an interpretation of the treaty; and his proposed reservation against the submission of our policy regarding questions of "the admission of immigrants to the decision or recommendation of other powers," being undoubtedly under Article XV of the Covenant "a matter which, by international law, is solely within the domestic jurisdiction" of the United States, would not be at variance with the provisions of the treaty or regarded as a substantial amendment. His suggested amendment, however, limiting the duration of the obligations under Article X so as to permit the parties, after five years and by giving one year's notice in writing, to terminate them, and his proposed change of Article IX in relation to the inspection and verification of armament, and of Article XIV providing for a conference to revise the Covenant and permitting the withdrawal of a member on one year's notice, would all undoubtedly come within the category of amendments to the treaty which, if adopted by the Senate, would require the assent of all parties to the treaty before ratification.

**WHAT IS TO BE DONE WITH OUR
RAILROADS?**



IX

WHAT IS TO BE DONE WITH OUR RAILROADS?¹

A PLAN OF REORGANIZATION SUGGESTED, UNDER WHICH THE BEST FEATURES OF COMPETITION AND GOVERN- MENT CONTROL CAN BE RETAINED

IN a recent speech before the General Assembly of Iowa, Senator Cummins very truly said that, with the exception of the League of Nations, the most important and the most difficult reconstruction problem confronting the country is the adjustment of the relation between the government and the railroads. Railroad managers, holders of railroad securities, bankers, labor leaders, shippers, state railroad commissions, and others have proposed plans for the reorganization of the national railroad system. But in most of these plans the authors have failed sufficiently to heed the admonition of Senator Cummins that "transportation by railway" must be regarded "as a governmental function." Yet it is undoubtedly that consideration which will be most potent with Congress when it comes to deal with the subject.

While the experience of the country since the government took over the railroads has inclined public opinion against government operation, that is because such operation cannot be made economical or efficient,—it is not because the people have ceased to believe that the ownership of railroads is affected by a public trust. Indeed, if the public had not become convinced that their interests would not be best subserved by govern-

¹ Reprinted from articles published in the *New York Times* of May 6-7, 1919.

ment operation, it is probable that the roads would never be returned to private operation; and it is quite certain that when they are returned they will be under much closer regulation than ever before, especially if they are to enjoy a government guarantee in any form.

The idea is now quite prevalent that the railroads of the country should be consolidated into a comparatively few large systems, and it is also generally conceded that in some definite way their credit must be established, so as to enable them in the future to procure necessary capital requirements. If this is accomplished through a government guarantee, ordinary business considerations will lead to a much closer association between the government and the railroads for the protection of the government's obligation. Indeed, with a more direct responsibility resting upon the government with reference to both rates and wages, the arrangement will be but one step from government ownership and operation, and its success will largely depend on government responsibility.

An adequate plan can probably be worked out before the expiration of the period within which under the railroad control act the roads must be returned to the companies. If the government had decided to shorten this period, as Mr. McAdoo proposed, the result might have been a return to pre-war conditions, modified only by amendments of the anti-trust law and other similar statutes, permitting pooling agreements among competing lines. Such a result would have been extremely unsatisfactory.

The war made it necessary to take over the roads from the companies. The transfer was made without undue disturbance, many problems were thereby automatically settled, which in normal times by the slow process of evolution would probably have occupied

years in discussion, and an opportunity unexpectedly developed for a permanent solution of the entire railroad problem. But a mere restoration of pre-war conditions, even if combinations and pooling agreements are permitted, would probably not go far in the direction of settling the relations between the government and the companies, of stabilizing rates and wages or of improving the service; and unless we succeed in making a permanent improvement in such things as these, we shall not have made the best of the opportunity which the war has fortuitously opened up. For, however unsatisfactory some features of government operation have been, there has been a convincing demonstration of many important advantages due to unified control, and the lesson would be largely lost if the roads were turned back without at the same time embodying these advantages permanently in the transportation system of the country. Fortunately, there is a fair prospect that this may be accomplished; but it will not be unless the railroad owners become reconciled to a much closer relationship to the government than has heretofore existed.

A PLAN OUTLINED

Having in view the foregoing considerations, I suggest for consideration a plan of reorganization upon the basis of the following general lines, viz:

1. Let some governmental agency divide the country into regions with reference to existing currents of trunk-line traffic, and in such a manner that competition shall exist between groups of roads in one region and those in each contiguous region.
2. Create in each region a federal corporation with one class of stock, and one class of bonds, and under contract with the government to acquire, by the issue

of these securities in exchange for those of existing companies, or by the exercise of the right of eminent domain, all of the roads within the region.

3. Let the government guarantee (a) interest on the bonds at such a rate that the bonds may be sold at not less than par, and (b) dividends on the stock at 4 per cent., subject to a readjustment after a fixed period of years, the stockholders to be entitled to receive additional dividends, if earned, of 2 per cent., and to share equally with the government any net earnings in excess of an aggregate of 6 per cent. on the stock.

4. As a result of the foregoing the government will necessarily participate more than in the past in the fixing of both rates and wages.

FUNDAMENTAL CONSIDERATIONS

I. Of the first importance is the creation of a transportation system which will be an effective instrument for the development of the social, political, economic and commercial life of the nation. This cannot be done without the coöperation of the general public, the investing public, the traveling and shipping interests, labor, organized and unorganized, and expert railroad managers. The problem is complex and difficult. It needs for its solution the thoughtful attention of every one knowing anything about the subject without undue bias caused by particular interest. It is no time for a business "trade" in the ordinary sense.

II. The interest of the present owners of the railway systems must next be considered. To fail to give this just and sympathetic consideration would result in a subtle form of confiscation. There is a popular misconception as to who these owners are. They consist of the stockholders and the bondholders. While, through long association with particular properties,

certain bankers and financial interests are supposed to own some railway systems, the fact is that far more than half of the railroad securities, both stock and bonds, now outstanding, is owned by investors either individually or through such financial institutions as savings banks and life insurance companies. It is said that seventeen billions of railroad capital are owned by 50,000,000 people, directly or indirectly. The influence that bankers have exercised in the management of some of the larger systems of the country has not been based upon their ownership of securities of the roads, but has been rather due to small investors seeking their advice and assistance. Additional railway capital will constantly be needed, since railroads are never finished, and it must continue to come from the millions of small investors, whether under government ownership it is raised by the sale of government securities, or under private ownership through the financial operations of private corporations. In either case it is vital that new financial structures be so erected that investors in railroad securities be not subjected again to the instability which the governmental policy of the recent past has caused.

PAST EVILS REMEDIED

It is undoubtedly true that in the early days the questionable, and even dishonest, gains of railroad contractors from branch-line construction or of managers in the acquisition of extensions in which they had a personal interest, overcapitalization, stock gambling, secret rebates, and illegal pooling, were common; but through bankruptcies and other corporate transmutations the water has been largely squeezed out of railroad securities, the sins of reactionary and rebellious railroad managers, owners and stock jobbers have been

expiated, and the railroads of the country are now owned in large part by the smaller investors who have honestly paid for their stock and bonds at market prices. For a long time after the Interstate Commerce law and the Anti-Trust law were passed, railroad managers generally adopted the unwise policy of opposing efforts of governmental agencies designed for the proper adjustment of the relation between the railroads and the government. They treated the Interstate Commerce Commission with little respect, and they did nothing of a constructive character to help to solve the problem. But remedies were finally found, although, as often results from excessive opposition, the pendulum swung too far and the legislative and administrative correctives became too radical, with the result that for a number of years before the government took over the railroads the companies were denied bare justice in the matter of rates, their lifeblood. For some time before the war the Interstate Commerce Commission persistently refused to heed petitions for increases of rates which were generally regarded as meritorious, and were certainly needed to prevent financial embarrassment. It is largely due to the fact that it was thought that the railroads were not being, and would not be, treated with justice, that the credit of the railroads became seriously impaired by investors refusing to buy their securities, particularly their bonds. The policy of the government has not been sufficiently changed in the management of the railroads under the Federal Control act. In the fixing of the standard return under the power conferred by that law, the Director General has sometimes failed to give adequate consideration to the peculiar conditions brought about by the Interstate Commerce Commission itself, through its refusal for several years to establish

just rates, and particularly in the case of the weaker roads which needed the special treatment which the law permitted the Director General to accord to them.

Thus, it has come about that first the Interstate Commerce Commission, by refusing to raise the rates, kept down the net earnings, and then in fixing the standard return the Director General did not always consider the situation which the government itself had thus brought about. If the injustice of this situation is not recognized and compensated for in any plan that may be adopted, not alone will the present investor be damaged, but the difficulty of obtaining money for future needs will be greatly increased.

THE LABOR PROBLEM

III. Labor must be fairly treated, and the power of the government must in some direct or indirect way be employed to accomplish that result. A fair return for labor is, of course, just as important as a just return to capital. Indeed, many thoughtful observers of world conditions believe that the next decade is to be an era of a participation by labor greater than ever before in the profits of production of all kinds. Furthermore, in the past the fixing of wages has been too much regarded as a matter solely between capital and labor—that is, between owners and employees—and satisfactory results have not come to either party. In the emergency of the war, the government, through increased rates, has made the public pay for the increase of wages, and hereafter, whether the government or the companies own and operate the roads, the interdependence of rates and wages will probably, more than in the past, become the basis of all calculation. If this be true, there will always be three parties involved in all wage controversies, viz: the owners (especially if they

have an interest in the profits in excess of any amount guaranteed to security holders by the government), the employees, and the government representing the public. Any increased operating cost, caused by a readjustment of wages, must be borne by the owners and the public in some just proportion, and in fixing the proportion the government will be interested even more than the owners, who will have the larger part of the return upon their securities assured by the government guarantee.

STATE REGULATION

IV. To what extent state utilities commissions shall continue to exercise powers of regulation is an important question. If the plan proposed above is adopted it will avoid the necessity for intervention by state commissions in some matters, particularly in the supervision of the issue of corporate securities. So, too, with consolidated systems owned by federal corporations and extending through a number of states, with their most important traffic having an interstate aspect, there will probably be but few and unimportant intrastate rates for them to regulate. Still, there will remain local interest which can be dealt with by state commissions more adequately and to the greater satisfaction of localities than by a distant federal commission; and in such matters these powers should not be interfered with.

FURTHER CONSIDERATION OF THE PRINCIPAL FEATURES OF THE PLAN

1. THE GROUPING

It would be necessary in each region to take into consideration the character of the population and in-

dustries, the climate, the probable direction of development in sparsely settled parts of the country, and, most important of all, the maintenance and development of a healthy competition between groups of roads in contiguous regions. Competition within each group would, of course, have to be eliminated. Save in exceptional cases, splitting up (longitudinally) of existing and established trunk lines would have to be avoided.

Consolidation of the roads within each region, through voluntary exchange of existing securities for those of new federal regional corporations, will be induced by (a) giving regulatory jurisdiction of interstate transactions to a local federal commission, (b) making such government guarantee of interest and dividends upon bonds and stock of the regional corporation as will make an exchange of securities advantageous, and (c) clothing each regional corporation with powers of condemnation. There is little doubt that a plan can be devised which will hold out such inducements to the large systems in each group that a consolidation into a single system owned by a federal corporation can be accomplished without resorting, save in exceptional cases, to the right of eminent domain.

The complete abolition of competition resulting from government ownership would discourage initiative and ambition on the part of railroad managers, would affect the morale of railroad employees, and would remove the most easily available comparative tests of results of operation. But a well-balanced group of railroads within a single region would not be essentially different from one of our great industrial combinations, and economies would be made possible on such a system through standardization of methods, re-

duction of expense of administration, and the elimination of expensive and unprofitable facilities which competition has created; and these results would more than compensate for the disadvantage of discontinuing intra-regional competition. If fifteen or twenty groups were established the elimination of competition in any one group would be far less in proportion to the entire transportation business of the country than that effected by such combinations as the United States Steel Corporation, the Packers' combination, the Standard Oil Company, the American Sugar Refining Company, etc.

But even if efficiency in the service may to some extent be impaired by the proposed combinations, that is a disadvantage which is far outweighed by the countervailing advantages. Without some grouping system under the direct supervision of regional commissions, the benefits of a government guarantee of securities and a stabilization of rates and wages can probably not be obtained, for if the government is to assume a larger obligation in relation to these matters, it must establish a supervising organization which will be adequate for the protection of its interests as a partner in the enterprise. But neither the supervision by the government nor the assured return upon the securities of the regional companies need interfere with the quality of service rendered to the public. Such a grouping of roads can be made as to maintain active competition between the groups, and it is not probable that there will be any great damage through elimination of competition within the groups themselves. It is fair to say that it is those advocating the preservation of the existing corporations that lay the greatest stress upon the supreme importance of competition; and their desire to restore the old order of things may

lead them to over-accentuate the point. But it is evident that the public will not concede the advantages of a partial copartnership arrangement unless many of the existing lines, perhaps unnecessary altogether, or, in any event, maintained under uneconomical conditions, are so consolidated and managed as to avoid undue waste.

MAPPING OUT REGIONS

It would be premature to attempt now to map out regions. This is a matter that must be dealt with by the government and by traffic and other experts. But an illustration will serve to promote discussion:

In the territory east of the Mississippi River and north of the Ohio River, the east and west traffic between New York and New England on the east and Chicago on the west would be the determining factor in fixing the boundaries of regions. The natural grouping would center around the New York Central and the Pennsylvania systems. With the former would be united the Delaware & Hudson, the Erie and all the New England lines (unless it were deemed advisable to have the two lines in competition through to Boston, in which case the New York Central could group its lines around the Boston & Albany and the Pennsylvania around the New Haven). With the Pennsylvania would be grouped all the roads in New Jersey and Pennsylvania, the Baltimore & Ohio, and perhaps the Chesapeake & Ohio. Thus would be created two great systems competing for the business between Chicago and the East and able to adopt a multitude of economies, now impossible, in the use of their numerous lines. South of Washington groups would naturally trend more nearly north and south; and the Southern and the Louisville & Nashville would

probably be the backbones of two competing groups, while the Illinois Central and the Missouri Pacific would be the natural foundation on which to build two groups competing for the business from Chicago to the South.

A proper division of the entire country would probably result in about fifteen or twenty groups.

2. PLANS FOR GUARANTEEING INCOME

A number of methods have been proposed by which a minimum net return may be guaranteed by the government. One of these methods seeks by Congressional edict to define what is a "reasonable rate," and to determine what shall be the net return upon investments in railroad property, while another would arrive at the same result by requiring that rates be fixed at a figure which will produce a minimum net return. Under still another plan it is suggested that out of gross earnings there be first set aside fixed proportions to be applied preferentially to the payment of interest and dividends on new securities. All such plans, when analyzed, will be found to be predicated upon an assumption by the government of an obligation, either directly or indirectly, to fix a rate schedule and to deal with wages and other costs in such manner that there shall be net income of a certain amount applicable to the payment of dividends and interest upon the securities of the companies. In other words, all of such suggestions involve a government guarantee of an income upon property invested in railroads. If I am right in this, it results that, whichever plan is adopted, there must be some method for appraising the property investment as a basis for estimating the income which is to be guaranteed upon it. That being so, it seems

to me that the direct guarantee of the income upon the securities of the regional companies will be preferable. In the first place, it is simpler and will be better understood. In the second place, it will avoid the uncertainties attaching to action by Congress or the Interstate Commerce Commission in relation to rates and the complicated financial structures suggested by some of the plans which contemplate intricate accountings not easily understood. The indirect form of government guarantee under such plans would undoubtedly make railroad securities less marketable than if the guarantee were direct, and to that extent the new companies would fail to receive the full advantage which would undoubtedly accrue from a direct guarantee. The credit of railroad stock and bonds with a direct government guarantee would undoubtedly be as high as that of government bonds themselves. The rate of income guaranteed should be fixed so that both stock and bonds would realize one hundred cents on the dollar, thus avoiding destructive discounts, commissions, and expenses which have for many years grievously burdened the less prosperous railroads.

It is quite possible that in working out a plan like that proposed it might be necessary for the protection of the government to put it in a position where by foreclosure of a lien or perhaps by a recapture clause, it may obtain possession of a regional railroad for purposes of reorganization, or even for government operation. The connection of the government with the new systems would be so close that such a provision might have to be made in order to provide for unexpected contingencies.

It remains to comment upon the suggestion which has been made in some quarters that the government

turn back the railroads to the old corporations without provision for enforced elimination of uneconomical competition, unification of management, joint use of terminal and other facilities, or similar expedients looking to economy and efficiency. It is not probable that the people of this country, having witnessed some of the advantages of the unification made necessary by the war, and having seen the solution of the railroad problem advanced many years as a result of the interruption of the management of the companies by private corporations, will now tolerate a restoration of the old conditions. Certainly they will not concede to the owners of railroads a fixed return upon their property investments if they are to continue under the old corporate control, particularly if the public is not at the same time to be given some assurance concerning rates, and the wage question is not to be satisfactorily adjusted. Labor will see as much reason for obtaining a fixed return to it as to capital, and the traveling public and shippers will be unwilling to have rates left for future determination unless standardization and economies through consolidation give promise of economical and efficient service. Any plan for government guarantee of income on property investment must come much nearer government ownership than that which contemplates the retention of the roads by the old corporations, and especially because, as pointed out above, the government must in return for any guarantee it makes be put in a position where, in case the new system breaks down, it can itself take possession of the roads and try some other form of operation, as, for instance, through leases to operating companies.

3. THE BASIS ON WHICH ROADS ARE TO BE ABSORBED
BY REGIONAL CORPORATIONS AND THE METHOD
OF DETERMINING SUCH BASIS

If the government is to guarantee a return on the securities issued by the regional corporations, it must, of course, be assured that they represent the value of the roads consolidated and that under normal conditions the estimated income of the regional group will be sufficient to reimburse it. Upon such an estimate the basis of exchange of securities must be determined. Security holders will not, of course, in all cases be satisfied with the terms proposed by the government. But the fact that their interests may be acquired under the right of eminent domain, coupled with the advantage attaching to a government guarantee, will no doubt induce nine-tenths of them voluntarily to make the exchange proposed by the government, especially if it is recommended by committees of security holders, which will probably be afforded the opportunity to conduct negotiations with the government.

In the case of minority interests refusing to accept the terms offered, Congress can constitutionally provide that the regional corporation (or perhaps the government) may acquire the physical property of the roads; or it might suffice to condemn the stock as a means of gaining complete control.

The delay and expense of condemnation proceedings are, of course, to be regretted, but it would be an incident to any plan of consolidated ownership, whether by the government or by a regional corporation. Furthermore, any delay in determining the compensation to be paid to the individual or corporate owners would not postpone the consummation of the plan, since it would be legally possible to provide that title should

vest in the government or the consolidated corporation upon the commencement of the proceedings, and thus possession and operation by the regional corporation could be assumed at once, while provision could also be made so that the standard return or the net income should continue to be applied to the payment of interest and dividends.

THE CONDEMNATION METHOD

The simplest method of acquiring the roads would be by condemning all outstanding stocks and bonds and thus securing control of the corporation, since in the case of many of the most important securities an index of value of considerable weight and easily proven is the market prices established during a number of years in public exchanges. Such prices would not, of course, be conclusive; indeed, no single circumstance would be decisive, and it would be open to an owner of securities to show that quoted prices did not represent real value, that the price would be enhanced by a larger volume of transactions, that the quotations were depressed below the fair value by the fact that the government was condemning and that prospective and speculative value was not fairly reflected in the market. Perhaps even physical valuation might be resorted to, and certainly the income-producing power of the company under normal conditions when not affected by the war, by recent reorganization, or by some other temporary or adventitious circumstances, would be pertinent. At best, the subject of fixing values is a complex one and generally, as in commercial bargaining, appraisers arrive at results by "splitting differences."

It is by no means certain that bonds could be acquired under the right of eminent domain, and it would not be wise to resort to that process if it threatened

seriously to affect the stability of market values. It is not improbable, however, that the prospect of receiving new securities, guaranteed by the government, would favorably affect the market for many bonds.

4. GOVERNMENT GUARANTEE AND PROFIT-SHARING

The impairment of the credit of the railroads before the war not only depressed the market value of railroad securities, but it compelled railroads to pay excessive rates of interest. The experience of the roads with the Bureau of Railroad Administration has not tended to improve the situation. The long delay in negotiating the contract, the reluctance in some cases in fixing the standard return to recognize, in the case of roads recently in difficulties, the existence of conditions making the three years' average an insufficient test, and the delay in paying over even 90 per cent. of the guaranteed income, have contributed to affect the credit of the roads. Some of the more prosperous roads have suffered less than those less favored, but it may with truth be said that the financial credit of the roads of the country as a whole has been so affected as to make them unable permanently to discharge their public functions as efficiently as the people have a right to expect. If a change for the better is not possible within a few years the country will be driven sooner or later to government ownership. If the advantages of private operation can be retained under such government regulation as will insure the adequate accommodation of the public, it would be in the public interest that that result should be striven for, but it cannot be obtained unless the railroads receive from the government a guarantee of a fair return on their property. Such a guarantee would have such a moral effect that the roads could immediately procure, at reasonable

rates of interest, all needed funds for improvement, extensions, betterments and equipment.

If security were required to insure the government against loss on account of its guarantee, it could be secured by suitable provision in an open mortgage securing the bonds so that on foreclosure the government could either purchase the road and operate it, or lease it to an operating company. It would be possible to provide for an unlimited amount of guaranteed bonds to be sold at not less than par, all ranking *pari passu* and equally secured by such a mortgage.

The government guarantee on the stock should insure a fixed return to be determined by the estimated minimum net earnings of the company in a region, all net earnings up to 6 per cent. to go to the company and anything in excess of that amount to be equally divided between the stockholders and the government. Probably a guaranteed dividend of 4 per cent. would be practicable. It might be necessary to provide, however, that if after some fixed period changed conditions required it, there should be a readjustment, effective for another fixed period, in respect of the distribution of any earnings in excess of the guaranteed 4 per cent. Such an arrangement as this would be justified by the advantage resulting to the public from the restoration of confidence in the railroads, the elimination of wasteful construction and operation, and the prospective return to the government from the profits of the enterprise, particularly since the government could be safeguarded in case of a failure to earn an amount equal to the guaranteed interest, by provisions under which, in case of such default, the government could possess itself of the property.

5. WAGES AND RATES

The plan would tend to solve both the labor and the rate problem. Rates and wages are the two factors on which more than any other the prosperity of railroads depends. Rates would be fixed by some government agency which would be interested to see that they were fair, since the guarantee of the government and the profit-sharing features make it a partner in the enterprise. If the demands of labor should disturb the equilibrium of the conflicting interests the government would be confronted with the alternative of (1) making good a part of its guarantee and losing its share over the guaranteed amount of earnings, or (2) authorizing an increase in rates to meet the increased wage scale, or (3) using its power under appropriate legislation through suitable commissions to regulate and standardize wage scales. In other words, the proposed plan would tend to tie up wages and rates in such manner that they would be interdependent.

RECALL OF DECISIONS

X

RECALL OF DECISIONS ¹

A MODERN PHASE OF IMPATIENCE OF CONSTITUTIONAL RESTRAINTS

THE function of the judiciary branch of the government is to try and decide controversies according to law and justice, without being swayed by considerations of governmental or political expediency, or by what judges suppose to be the temporary desires of a majority of the electorate. In the distribution by the Federal Constitution of the powers of government, the judicial department was made free of checks upon its powers like those imposed upon the executive and legislative departments. After the judges had been appointed by the President and confirmed by the Senate, and their salaries had been fixed by Congress, they were to hold office during good behavior and their salaries were not to be reduced during their terms of office. Hamilton explains the reason for these provisions as follows:

“The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that which shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution, void. Without this, all the reservations of particular rights or privileges will amount to nothing.”

¹ Paper read at the annual meeting of the New York State Bar Association, held in Utica, N. Y., January 24-25, 1913.

While the judges are, therefore, made essentially independent, it is impossible for them, for any long period, to deprive either of the other branches of the government of their constitutional powers, or to rob the people themselves of any of the rights which are essential to their enjoyment of civil liberty, because there is not placed in their hands any machinery by which judicial aggressions can be made effective. Their judgments can only be executed through civil officers like sheriffs and marshals, and these become quite powerless if they are opposed by the other departments of the government or by the people themselves. Furthermore, the political effect of a judgment involving the most important constitutional question may be entirely nullified, or it may be rendered, by force of public opinion, largely academic. As de Tocqueville said, the judges defend "the conservative spirit of stability against the fickleness of the democracy. Their power is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law." And Hamilton says of the judiciary, that "it may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

But, however impotent the courts are to seize political control of the government, their power, when supported by public opinion, to impose upon the people the restraints provided for in the Constitution, is more majestic than that possessed by any other judicial body in the history of the world; and it is this power, which more than any other, has at critical junctures protected us against excesses of partisan zeal, has given to our government the stability which has enabled it to sur-

vive and has enabled us to enjoy the inestimable benefits of a representative form of government which have been denied to other nations having written constitutions no less perfect in theory than our own. President Hadley has very aptly said:

“Legislature and executive are means given to allow the people to do what they please, under certain constitutional forms. The judiciary is a means given to prevent the people from doing what they please. How can we explain the fact that these judicial restrictions are of the very essence of freedom? I answer because the law of the United States, as defined and administered by its courts, represents not only restraint, but *self*-restraint; and a kind of self-restraint which any nation must be prepared to exercise if it hopes permanently to enjoy the advantages of political freedom.”

De Tocqueville asserts that without its restraints the “Constitution would be a dead letter.” And Webster says “that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government no government. . . . The judicial power is the protecting power of the whole government. Its position is upon the outer wall.”

The working out of the plan for the division of powers between the executive and the legislative departments of the national government has not been precisely what the framers of the Constitution anticipated. It is doubtful whether these departments could have conducted the business of the government without destructive friction if political parties had not at an early day become the convenient medium for promptly and effectively organizing public sentiment as a force to compel the reasonable adjustment of conflicting views. The judicial department, however,

has to a large extent fulfilled in practice the function which was in theory vested in it by the Constitution; and the same may be said with general accuracy of the judiciary of the several states as constituted under the state constitutions. But now it is said that some of the courts have become slow to respond to the throb of popular impulse, or, when called upon to interpret constitutions, to make their judgments conform to modern ideas of social and industrial justice, or to adopt a philosophy abreast of the times. We are told in the heat of a presidential campaign, that fundamental questions which have always been regarded as judicial questions, should no longer be finally decided by the courts but, on appeal, by a vote of a temporary majority of the electorate. It is startling to the present generation that such an attack upon the power of the judiciary should be made by a conspicuous statesman as part of the propaganda of a political campaign; but a brief review of our political history will show that the judiciary has often at critical junctures of our history been an unpopular branch of our government, and that it has not infrequently been made the object of political attacks no less determined than the present one.

The decision of the Supreme Court, in 1793, in *Chisolm v. Georgia*, holding that a state could be sued by a citizen of another state, caused a "shock of surprise" and widespread opposition throughout the country, which was intensified by the supposed arrogance of the federal judiciary, springing from their possession of powers under the Constitution which represented within certain spheres of government a sovereignty superior to the states. The ideas voiced by Mr. Jefferson, based upon the expressions of the leaders of the French Revolution as to abstract justice,

political freedom and the equality of men, were remarkably like those expressed by certain political leaders of to-day, when they attempt for party purposes to give a definition to modern progressivism, and they created a widespread unrest, particularly in relation to the supposed aggressions of the courts. On January 2, 1801, in declining the offer of President Adams to appoint him again to the office of Chief Justice of the United States, Mr. Jay wrote to President Adams:

“I left the bench perfectly convinced that under a system so defective it (the judicial department) would not obtain the energy, weight and dignity which are essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the judges, on this important subject, have been treated.”

For many years a majority of the people of the country, represented by the Republican party, refused to accept the decision in *Marbury v. Madison* as a rule of political action. Mr. Jefferson in 1819 referred to the movement which resulted in his election as “the Revolution of 1800,” accomplished by the suffrage of the people, and complained that while the nation had thus “declared its will by dismissing functionaries of one principle and holding those of another in the two branches, executive and legislative . . . the Constitution had deprived them of their control” over the judiciary department. He referred to the power claimed for the judges to decide constitutional questions as “a very dangerous doctrine indeed, and one

which would place us under the despotism of an oligarchy." In 1821 he said "The judiciary branch is the instrument which, working like gravity without intermission, is to press us at last into one consolidated mass." And again, "It is a misnomer to call a government republican in which a branch, the Supreme Court, is independent of the nation. . . ." He denounced in no less emphatic terms the manner in which Chief Justice Marshall presided at the trial of Aaron Burr and said that it would "produce an amendment to the Constitution which, keeping the judges independent of the executive, will not leave them so of the nation."

The decision in the case of the *United States v. McCulloch* excited no less opposition than that in *Marbury v. Madison*. In Kentucky the feeling ran so high that an attempt almost succeeded to remove from office a judge of the State Supreme Court because he had, on the authority of the decision in the *McCulloch* case, declared a state replevin act unconstitutional. For similar reasons the legislature of Kentucky created a second State Supreme Court; and it is not too much to say that the whole judicial situation came perilously near creating a civil war in Kentucky. The manner in which President Jackson, having an overwhelming public sentiment behind him, succeeded in rendering ineffective the judgment in the *McCulloch* case is too well known to need extended reference. In vetoing the bill for the extension of the charter of the bank, this most popular of Presidents said that "the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Later came the *Dred Scott* decision which offended a great portion of the American people, and the *Legal Tender* cases, which excited widespread criticism; and

in later years we all remember the intense feeling aroused by the decisions in the *Income Tax* cases, and in the *Debs* case, which involved the power of a court to enforce its own decrees by punishing recusant parties for contempt, and by the exercise of the power to issue writs of injunction in labor disputes.

These are a few instances, of which there are many similar ones in the judicial history of our country, which serve to illustrate how at certain crises decisions of the courts have aroused a feeling of antagonism which has been often more widespread, more intense, and more insistent, than that which now demands the recall of decisions; and it seems fairly reasonable to predict that if the principle of the recall should now be conceded, even in a limited form, every new political, industrial, economic or social question agitating the people in the future, would be the occasion for new applications of the principle until finally we should have the courts the mere timorous conduits of what they might guess to be the opinion of the majority of the electorate.

It is not probable that our courts will ever, for long periods, be free from criticism. Whenever the people seek to eradicate abuses in the administration of the government or when they aspire to elevate their social or industrial or political condition, they become impatient of any restraint imposed upon their zeal by the Constitution; and it is upon the courts, whose duty it is to impose the restraint, that their discontent is naturally visited. The demand for the recall of decisions is the result of impatience of this kind because the courts have not found some way to overcome the constitutional obstacles to securing a complete and immediate readjustment by legislation of social and industrial relations, which it is thought will correct some

intolerable conditions which have arisen in the rapid development of American civilization in the last two decades. The recall was at first advocated as a means of reversing judgments rendered by judges who were "steeped in some outworn political or social philosophy and totally misapprehend their relations to the people and to the public needs."¹ It was to be used in rate cases and trust cases, because these are problems "in administrative statesmanship," and also as a means of authoritatively reconciling "conflicting decisions of the courts," such, for instance, as the decisions in the *Income Tax* cases. Although it was at first stated that it was not intended to apply the recall to "anything in connection with the Supreme Court of the United States or with the Federal Constitution,"² and the arguments in its support related principally to state court decisions, the author of the doctrine now advocates, without qualification, an amendment to the Federal Constitution, proposed by Senator Bristow, under which a decision of the Federal Supreme Court, holding an act of Congress unconstitutional, may be recalled at a regular Congressional election by a majority vote "in a majority of Congressional districts, and also in a majority of the states."

Many of the arguments in favor of the recall of decisions have been partisan and indiscriminating, and have represented an inarticulated agitation against the courts, largely based upon defects in the administration of justice from which undue delay, excessive expense and vexatious technicalities have resulted. We all agree that these can and ought to be corrected, but the recall would be neither an appropriate nor an effective remedy for their correction. The serious and

¹ Editorial in *The Outlook* on "Judges and Progress," by Ex-President Roosevelt.

² Mr. Roosevelt's Carnegie Hall address.

responsible arguments for the recall of decisions, however, have been based almost exclusively upon decisions of state courts, and principally those of the New York Court of Appeals, in a class of cases in which certain legislative acts designed to promote so-called social or industrial justice have been declared not to constitute a proper exercise of the police power, but to be a violation of the state or Federal Constitution, because they would deprive persons of liberty or property without due process of law. The advocates of the doctrine are, however, pushed, as Mr. Roosevelt and Senator Bristow have been, to favor the doctrine as a means of securing the review by popular vote of all decisions of both state and federal courts upon constitutional questions. And if the principle of the recall is once conceded, there is no reason, either theoretically or practically, why it should not be extended to all judicial questions where the social, industrial or political interests of the people are involved.

Mr. Roosevelt's remarkably able arguments on the recall have been elaborated in a book entitled "Majority Rule and the Judiciary," by Mr. William L. Ransom, to which, in July last, Mr. Roosevelt wrote a commendatory introduction. Professor William Draper Lewis, Dean of the Law School of the University of Pennsylvania, has also given the weight of his name and his position to the new doctrine. All of these gentlemen have treated the subject philosophically; and their major premise is based upon a conception of the scope and meaning of the police power which they assume to be justified by a succinct reference to that power by Mr. Justice Holmes in the *Oklahoma Bank* case.¹ But they have all failed to observe that Justice Holmes's allusion to the subject is didactic

¹ *Nobel State Bank v. Haskell*, 219 U. S., 104-111.

rather than analytic, and that he only mentions in a general way certain characteristics of the police power, without attempting to give a definition to be generally applied. In their quotation from his opinion, they have always omitted, as immaterial to the discussion, certain parts which seem to me to be highly important, if his brief reference to the power is to be regarded as a definition. In the following extract from the opinion, these omitted portions are italicized:

"It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. . . . With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

It is a fundamental error to suppose that the "strong and preponderant opinion," referred to by Justice Holmes, would be one expressed in relation to a particular case by a majority of the electorate. "Strong and preponderant opinion" which determines the necessity for the assertion of the police power, is based upon usage, prevailing standards of morality and expediency, and becomes by gradual process fixed in the community with such a degree of permanency that it is not dislodged except by a slow process, and in the development of national character and the social, industrial or political needs of the entire people. Such "strong and preponderant opinion" could not be ascertained to exist by the vote of a majority of the electorate composed of 25 per cent. of the entire population; that is, by one-eighth of the entire people. It is rather an opinion concerning existing conditions in our

social, industrial and political life which, in most cases, is, without such a vote, readily recognizable; and where in border cases it is not so manifest, the rule for the application of the police power must be, as Justice Holmes says, "pricked out by the gradual approach and contact of decisions on the opposing sides." It is, of course, because in some of the border cases it is supposed that some of the courts have "lagged behind," that the recall of decisions is suggested as a means of accelerating their philosophical reflections. If some courts (it is not charged that there are many) have thus failed to meet the expectations of advanced thought upon the subject, they should not be condemned wholesale, for they are but human agencies from which perfection is not to be expected; and it must not be forgotten that from the same imperfection, if the recall were adopted, the danger would be that the courts, practically freed from the restraint of conservatism, would generally "prick out" the application of the police power on the wrong side of the border. It all comes to this: Until there pervades the community, not only a strong and a preponderant, but also a fundamental and a permanent, opinion concerning the application of the police power to a particular question, the whole matter is essentially one for judicial interpretation and not one which justifies the interruption of the reign of constitutional law by reference in particular cases to the temporary majority of the electorate, aroused, and perhaps misled, by an excess of partisan zeal.

There was significance in Mr. Justice Holmes's qualification that he was describing the police power only in "a general way," for the courts have always refrained from attempting precisely to define the power, lest a generalization should be inadequate to cover con-

crete cases arising in the future. The purposes of the police power are referred to, but its existence in a particular case is left by the courts, as in cases of fraud, to be determined when occasion arises. It is easier to say what it is not, than what it is; but a temporary majority of the electorate would be a very uncertain guide in determining whether an occasion required its exercise. In the *Jacobs* case,¹ Judge Earl said: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it." Chief Justice Shaw, in *Commonwealth v. Alger*,² said: "It is much easier to perceive and realize the existence and sources of the power, than to mark its limitations, or prescribe limits to its exercise."

A point which has generally been overlooked by those favoring the recall, is that at the outset a court is called upon to decide whether a law sought to be justified as an exercise of the police power, is in fact a health law or a general welfare or other similar law, or whether it is not, under the guise of such a law, passed with some ulterior and sinister purpose, as, for instance, improperly to serve some corporate interests, or to afford a basis for lobbyists or others to levy blackmail on such interests. It was a question of this kind which was determinative of three of the four cases in the New York Court of Appeals, which are discussed below, and which have been repeatedly asserted to be conspicuous instances in which the courts have failed to respond to the prevailing sentiment of the community.

Both questions which thus arise in relation to the police power are essentially juridical. They involve a

¹ 98 New York 99-110.

² 7 Cushing 53-84.

philosophical analysis of each case as it arises, lest, under the guise of a power inherent to sovereignty and rising superior to constitutions and laws, the individual may be deprived of his property, his liberty or his life, without due process, although in form, of law. If, as a result, a social or industrial reform be temporarily retarded, until its necessity has been calmly considered and the machinery for its accomplishment has been deliberately worked out, not by votes in special cases referred for decision to the people, but under fundamental constitutional law as finally interpreted by the courts, influenced, as they inevitably will be, by public opinion, that is far better than that a single citizen should be deprived of his life, his liberty or of his property.

The discussion of this phase of the recall doctrine cannot be made complete without a brief reference to the four New York decisions already referred to.

In the *Tenement House* case,¹ one Jacobs was prosecuted criminally for carrying on the trade of cigar-making in his own home, in violation of the provisions of an act of the legislature. It was sought to sustain this act as one to promote the public health. It appeared as a matter of fact, however, that it was not a health measure at all, but that it had been passed by the procurement of the owners of large tobacco factories in the city of New York and Brooklyn, for the purpose of crushing out the competition of persons working in tobacco manufacture in their own homes. The Board of Health of the city of New York officially declared that the act in question was not "a sanitary measure," and further, "that the health of the tenement-house population is not jeopardized by the manufacture of cigars in those houses." Thus, the main

¹ The Matter of Jacobs, 98 New York 98.

question involved in this case was whether the act by which it was attempted to imprison Jacobs was a measure improperly procured for an ulterior purpose by the large vested interests. The court held, and was sustained by the Supreme Court of the United States in the holding, that the measure was not a health measure at all and that there was, therefore, no occasion, in the general interest, for suspending the safeguards of the Constitution by depriving Jacobs of his liberty. Judge Earl, one of our greatest judges, speaking for the court, said:

"It is plain that this is not a health law, and that it has no relation whatever to the public health. Under the guise of promoting the public health the legislature might as well have banished cigarmaking from all the cities of the state, or confined it to a single city or town, or have placed under a similar ban the trade of a baker, of a tailor, or a shoemaker, of a woodcarver, or of any other of the innocuous trades carried on by artisans in their homes. . . .

"When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

If an effort had been made to recall this decision, it is not difficult to see how the matter would have been presented to the people, for to the chief advocate of the recall of decisions the principal question in the case was whether a tobacco worker should or should not be permitted to pursue his vocation in "one foul room in which two large families, one with a boarder, live and

work day and night, the tobacco they manufacture being surrounded with every form of filth.”

In the *Knisley* case,¹ there was no question of constitutional law at all. The court merely construed the Employers' Liability Act, and determined that under its provisions an employee injured in a machine which had unguarded cogwheels could not recover when the danger was visible and plainly known to her. It did not hold that the act was unconstitutional, but merely followed the decisions of the courts of Massachusetts and England, interpreting similar statutes. The statute could, of course, have been immediately changed by the legislature. The case neither illustrates nor supports the argument for a recall of decisions.

In the *Williams* case,² the court declared unconstitutional a statute which prevented a woman from working at any trade in a factory after nine o'clock at night. The decision was based upon the fact that there was nothing to show that mere working at night had any relation to the healthfulness of the employment. The court held that the statute was an undue interference with an adult woman who, with the other women in the same employment, insisted upon her constitutional right to earn her living by skilled labor in the book-binding business, even though the requirements of the business necessitated the doing of the work at night three or four nights during the week. If she had not been permitted to work, she would have been driven out of her trade, and the work would have had to be done by men, because it was a matter of indifference to the employers which sex was employed.

The only case affording even a colorable ground for the claim that the courts of this state have “lagged

¹ 148 New York 372.

² 189 New York 131.

behind" the enlightened thought of the day is the *Ives* case,¹ in which it was decided by the Court of Appeals that the Workmen's Compensation Act was unconstitutional. That act provided that an employer in certain occupations regarded as dangerous should pay damages to an employee who was injured, even if the employer had not been guilty of any negligence or failed in any way to discharge his entire duty to the employee. The court held that the legislature had the power to abolish the fellow-servant rule, the rule as to risks assumed in a dangerous occupation, and the rule as to contributory negligence; but that, in imposing a liability upon an employer, when he was entirely free from fault, property was taken from him without due process of law. The New York act went further than any other similar act passed in this country except, perhaps, that passed by the State of Washington, and sought by a single drastic provision to abolish every rule of law relating to the subject which had existed for hundreds of years. While there may be a doubt as to whether the decision in the *Ives* case was clearly right, there certainly was some reasonable ground for saying that to mulct an employer for damages for injuries which he has not directly or indirectly caused is not consonant with abstract notions of justice, with rules of law, or with the Golden Rule. The court in its opinion did not give the slightest indication that its conclusion was influenced by any "outworn philosophy" or by anything but a desire to cooperate, so far as the Constitution would permit, in the humane and disinterested efforts of the citizens who procured the passage of the Workmen's Compensation Act.

There has, therefore, been no real grievance in this state, based upon these four decisions. But even if

¹ 201 New York 271.

there had been, there is no sufficient reason why it may not be dealt with by an amendment of the Constitution after mature deliberation, free from the turmoil of political contention. If there is a fault, it is fundamental; and it is just such matters that should be regulated by constitutional provision. It is objected that the process for the amendment of the Constitution is slow. That is indeed fortunate. Never before was deliberation more necessary; for the proper adjustment of our governmental machinery to meet the needs of the social and industrial development is a problem of unusual difficulty. But to decide by a bare majority of the electorate individual cases where the assertion of the police power conflicts with the claim of the individual that his liberty or his property shall not be put in jeopardy, would create the utmost confusion in our system of jurisprudence. The voters would pay little attention to anything except the question whether, in the particular case referred to them, they would prefer for some reason, however prejudiced or partisan or whimsical it might be, that the decision should not stand. Such a preference would inevitably be influenced in a short political campaign by such *ad captandum* arguments as partisan zeal might suggest; and the vision of a most enlightened elector as to the ultimate effect of the general adoption of the recall as a principle of government, might well be obscured by circumstances in a particular case appealing to his sympathy or to his prejudices. It would be too much to expect that the people could, in the short time available in each recall campaign, be adequately informed as to the facts in the record before the court, showing that the statute under consideration was not in good faith a health measure or a welfare measure, or as to the broader philosophical considerations which had led

the court to decide that the act under consideration was not so necessary to the social and industrial development of the people as to justify the setting aside of the constitutional guarantees of life, liberty or property.

It is said that no one can draw constitutional amendments empowering the courts adequately to deal with cases of social and industrial injustice, which will not also be so comprehensive as to include cases to which they are not intended to apply. Professor Lewis argues, for instance, that a general amendment to sanction a particular compensation act or a particular act regulating the hours of labor, would permit the enactment of *any* compensation act or *any* act regulating the hours of labor; and that the courts would be compelled to declare the act constitutional, however unwise or radical its provisions. We must, indeed, admit that there is a real difficulty in framing a constitutional definition of the police power which could be intelligently applied to any future situation; but to argue that, if it was attempted, the legislature would be too radical in the exercise of the power thus defined and, therefore, that it is safer to submit special cases to the people themselves on short notice, is to ignore the fact that it would never be difficult to make the legislature promptly respond to the demands of the people in the improbable event that it showed tendencies which were too radical. It is, of course, true that the legislature, knowing that the constitutionality of its acts is to be examined by the courts in a preliminary and inconclusive manner only, would go as far in passing laws as it was supposed that a majority of the electorate would approve; but it is absurd to say that they would habitually go further. Whether the people or the legislature are made the final arbiters as to the necessity for the exercise of the police power in given cases, or in re-

viewing a decision of the court upon any other subject, there would be no practical difference in the results. In either case it would inevitably happen that those restraints upon the power of the people and the legislature, which the experience of history has taught to be necessary to secure stability in a popular or representative government, would be utterly destroyed, and our civil liberties would speedily disappear under the malign influence of "the greatest of all despotisms . . . a government of special instances."

The admitted difficulty of dealing with this subject by constitutional amendment gives especial cogency to the argument already advanced that the peculiarly changeable and elastic nature of the so-called police power makes its extent and character in particular cases essentially a juridical question, wholly inappropriate to be submitted for solution under any possible constitutional provision either to a representative assembly or to the possible tyranny of a bare majority. It is a question upon which especially the law, and not the temporary opinion of the electorate, should be supreme, lest, by gradual process, the wise restraints of our Constitution being removed, we should develop into a pure democracy, and then, perhaps, by the next step into State Socialism. In such a situation, these words of Aristotle seem prophetic:

" . . . Another circumstance which leads to the last form of democracy is that all who have any complaints against the officers of state, argue that the judicial power ought to be vested in the commons, and as the commons gladly entertain the indictment, the result is that the authority of all the officers of state is seriously impaired. . . . It would seem a just criticism to assert that this kind of democracy is not a constitutional government at all, as constitutional government is impossible without the supremacy of laws."

Let us consider for a moment what a judge would be confronted with in considering the constitutionality of a statute claimed to be valid as an exercise of the police power. Obviously he could not confine himself to the record in the case before him. If the statute should be a health law and the judge had not had occasion before to give to the question any definite consideration, where would he go for information? It would be of little use to go to the scientists or to the employees, or to the public-health authorities, or to the vested interests which, perhaps, were responsible for the legislation. The surest authorities to consult would be the political leaders, to ascertain how the people would vote at an election to recall the decision of the judge. For the question would be, not even what was the preponderant opinion of the entire community, but rather, in the particular circumstances surrounding the case and in view of the prejudices which would be likely to be aroused through sympathy or otherwise, which side would receive the votes of the larger number of qualified electors. One may imagine the perplexities of a judge sworn to administer his office according to law and the immutable principles of justice, who finds himself compelled to leave his library and consultation room, and engage in the hazardous occupation of political prophecy. And if the case before the court involved the question whether the public welfare required that railroads should give transfers, or whether gas companies could charge more than a rate fixed by statute, or railroad companies more than two cents a mile, or whether, in a case for the condemnation by a railroad of land, a necessity for the acquisition of the land existed, or any similar question where on the one side were the vested interests and

on the other the material interests of large numbers of people, his dilemma might be even more serious, for he might find that a conscientious regard for his oath to administer the law as he believed it to be would lead him to decide in favor of the corporate interest, while, with no great skill as a political prophet, he could predict that his decision would be reversed by a referendum to the people.

Whatever the question involved, the vote of the people would be based upon no clear or enduring principle which could be formulated, nor could the reasons of the voters be ascertained with any degree of certainty, for use as a precedent for the guidance in the future either of constitutional conventions or courts or legislatures, or even of the people themselves. Upon a subsequent referendum upon a similar question, it might well happen, therefore, that, through some factitious circumstance, political, social, industrial or personal, a different vote might be cast; and as a result of repeated referendums we would soon have an irreconcilable conflict of popular decisions, without the possibility of deducing any safe or certain guide for future action. Our system of jurisprudence, so far as it deals with the rights of property, would become merely a mass of special instances from which no generalization could safely be made, while the judiciary itself would no longer find it worth while in their decisions to impose futile constitutional restraints. The courts would become an adjunct of the executive and the legislative departments of the government, and the property and liberty of each individual, and every right and privilege which he had been taught to regard as being sacredly guaranteed to him by the Constitution, would be at the hazard of the tyrannical power of a majority of

the electorate, influenced by its temporary interest, prejudice or sympathy, or by some other equally irrelevant motive.

The judges of a state court are sworn to discharge their duties according to the best of their "abilities and understanding, agreeably to the Constitution and laws of the United States." Upon a recall of a decision of state judges, they might find themselves confronted with a vote of the people of their state finding that their interpretation of the Federal Constitution was wrong, although they had been compelled to follow a decision upon the subject by the Supreme Court of the United States, because the interpretation by that court of the Federal Constitution is made by that instrument the "supreme law of the land." If, upon another hearing after a recall by the people of their state, they were to conform their judgment to wishes of the majority, they would find themselves compelled to pronounce a judgment at variance with an interpretation of the Federal Constitution which, under the oath just referred to, they were bound to adopt. Until the whole subject could be passed upon by a vote of the people of the nation, there would, therefore, be conflict between the people of the states and their courts, between the state courts and the Supreme Court, and between the Supreme Court and the people of the United States; in short, there would be chaos in our judicial procedure and absolute uncertainty as to the law by which the rights of the individual citizen were to be governed. We are now in the midst of a very remarkable social and industrial development. This has already presented for the decision of the courts, especially the federal courts, questions of far-reaching importance; and on the horizon appear new questions concerning old-age pensions, government

ownership of railroads and other public utilities, the adjustment of the relation of labor organizations to the government and to the employer, graded inheritance taxes, and changes in the taxing system generally. If the principle of direct reference to the people of judicial decisions is once conceded, it is to this kind of questions especially that it will be applied; and in the heat of political contests for their immediate settlement, the rights of the individual will be forgotten and one after another of the decisions of the courts upholding the constitutional guarantees of liberty and property will be set aside, and finally the entire structure of representative republican government will be ruthlessly swept away by the votes of bare majorities at successive special elections. It is no exaggeration to say that the proposition puts "the ax to the root of the tree of well-ordered freedom."

There is no pressing necessity for the adoption of the recall of decisions. It has been asserted, as I have already said, that the proposition has nothing to do with the United States Supreme Court, and is only an effort "to bring laggard state courts of ultimate appeal up to the progressive standards set by the nation's great court. If you do not agree with those standards your quarrel is with Chief Justice White and his colleagues, and not with Colonel Roosevelt or Dean Lewis."¹ We have seen that, after the election, this limitation of the recall was repudiated by the leaders of the Progressive Party, and that although nothing has since happened to suggest a doubt that the Supreme Court of the United States entertains sufficiently advanced views upon the burning social and industrial questions of the day, they propose to subject that tribunal also to the ignominy of a recall of its de-

¹ "Majority Rule and the Judiciary," by Ransom.

cisions; and, under Senator Bristow's amendment, not only is this to be in matters involving the exercise of the police power under the due-process-of-law clause of the Constitution, but also where the court has construed a clause of the Constitution containing an express and unambiguous prohibition or restraint. And thus a law held by the courts to be unconstitutional because it abridged "the freedom of speech or of the press," or related to the "establishment of religion" could, by a vote of a bare majority, be held valid; and by a similar vote the Constitution and laws of the United States could be declared to be no longer the "supreme law of the land" and the federal courts no longer to be vested with "the judicial power of the United States." The guarantee to the states that they should always have "a republican form of government" could be set aside; and indeed, under the proposed amendment, our entire form of government could by a single vote in a single year and under the temporary spell of some extraordinary leader, inspired perhaps by good, if unwise, but more likely by bad motives, be swept away. It is not probable that the people will ever adopt the extraordinary amendment proposed by Senator Bristow, yet that it could be proposed by a Senator of the United States as a logical extension of one of the most important planks in the platform of a political party, indicates the loose thought and adventurous spirit with which this vital subject is being dealt.

If the Supreme Court has up to the present time discharged its duty in interpreting public opinion in relation to matters of social and industrial justice, why should such a radical proposition be even suggested, to be held over their heads *in terrorem*? It would be the height of folly to apply to their decisions the recall;

and there is even less reason for applying it to the state courts since any of their shortcomings may be readily remedied by a simple amendment to the Federal Judiciary Act, providing that, where a state court decides that a state law is not a valid exercise of the police power and therefore that it violates the due-process-of-law provisions of the Fourteenth Amendment of the Federal Constitution, an appeal may be taken to the Supreme Court. Unless it be assumed that the Supreme Court is to change its present advanced and progressive view of the scope of police powers, this amendment will effectually cure the evils complained of in a few of the state courts, and their "outworn philosophy" will soon disappear without revolutionary change in our judicial system, and by a perfectly normal development of our American constitutional law. There seems to have been no serious attempt by the advocates of the recall to explain why such an amendment to the judiciary act will not permanently and effectually correct any mistake of the few state courts which have offended against the new political philosophy. They have, it is true, attempted to attract conservative support by asserting that the recall of decisions is an antidote to what they claim to be the more radical doctrine of the recall of judges. But while the recall of judges is vicious in principle because it would, if frequently resorted to, tend to deteriorate the character and destroy the independence of the judiciary, yet it would be an awkward and unsatisfactory expedient and would probably after a few experiments fall into disuse; particularly since it has been shown in the *Archbald* case how effective an impeachment can be made for the punishment of judicial improprieties. But even if the recall of judges were frequently availed of it would be far less injurious in

its results than the recall of decisions. For the latter device would not only have a demoralizing effect upon the character, efficiency and independence of the judiciary equal to that produced by the recall of judges, but it would, particularly in its post-election form, be infinitely more dangerous to our institutions, for the reason, already referred to, that it would afford a means by which the electorate could, in the heat of successive contests and by a bare majority, sweep away one after another of the restraints of the Constitution which had proved temporarily inconvenient, until finally the whole governmental structure should be toppled over. The insidious danger in this form of recall lies in the fact that it would work, as Judge Bradley said, "by silent approaches and slight deviations," and that, where the sympathies or the prejudices of the electorate were temporarily aroused in a particular case, it would be impossible successfully to resist a recall by an unemotional discussion of its ultimate effect in contributing to the overthrow of our constitutional form of government.

It is said that the recall of decisions has been unfairly attacked because it has been charged that it amounted to "a reversal of judicial decisions by popular vote." This seems, however, to be an essentially fair description. It is quite true that it is not proposed to review decisions in ordinary litigation; that is, where between individual litigants, the ordinary and conventional rules of our system of law are applied. But, passing the question whether if the principle of the recall were conceded it might not be pressed to the point of applying it to such cases, the fact is that great constitutional questions always arise in cases where the rights of individuals are involved, and in the case of the recall of a decision, it would always happen that

the vote of the people would deprive some individual citizen of his liberty or his property, in violation of his constitutional rights as interpreted by the court. And it would not be alone that citizen who would suffer; for any one might at any time have his liberty or his property put in jeopardy by the recall of a decision upon the same question by a misled, an excited or a tyrannous majority. It must not be forgotten that the whole system of Anglo-Saxon civil liberty has been built up upon principles settled in controversies where the interest or liberty of single individuals was alone involved, as for instance, in the cases of John Hampden and the Ship Money, of Wilkes and the Freedom of the Press in England, and of Dred Scott and the Fugitive Slave Law.

Under the baneful influence of the recall, the character of the bench would, as I have already suggested, deteriorate; and the judicial function would finally become a servile instrumentality for carrying into effect the wishes of a majority of the electorate. Contemplate the position in which dignified judges like those composing our Court of Appeals would be placed by a movement for a recall of one of their decisions! After giving to a case an industrious examination of the evidence and the arguments, and after an impartial consideration of it from the standpoint of the accumulated wisdom of the wise judges and statesmen of the past, embodied in constitutions and our system of jurisprudence, they would find their decision submitted to a vote of the people with the record either misrepresented or disregarded, and with no suitable or adequate opportunity to present the weighty considerations which had led them to their conclusion. The reasons which would sway the electorate would probably be those of partisanship in some form, which the judges

would have studiously refrained from considering; and the judges could not demean themselves—if their participation were tolerated at all—by attempting to meet the arguments of the political orators, especially when, as it would often happen, they were of a character that, if urged in open court, would be regarded as contumacious. Nothing could present a situation so offensive to the dignity of a court representing the majesty of the law. The grandest function of a court is performed when it pronounces a judgment in accordance with righteousness and law, even though it be denounced as a usurper of the rights of the people; and it is in just that kind of cases that the recall of decisions would most frequently be resorted to. It is difficult to conceive of a court of the dignity of the Court of Appeals of the State of New York, composed, as Mr. Roosevelt says, of “reputable and honorable men,” being subjected to the humiliation of such an ordeal. Rather than endure it, the men who were of the greatest judicial skill and experience and of the highest character would refuse to serve; and as a result the character of the judiciary would inevitably deteriorate.

But it will be asked: if the fundamental objections to the recall of decisions are insurmountable, how can some courts be made to adopt a point of view in construing the restraints of the Constitution which is more accurately adjusted to the developing social and industrial philosophy of the day? I have already said that this can and should be done either by amending the Constitution or by presenting the mooted questions in new cases and pressing upon the court new considerations to induce them to change the decisions complained of, as well as by taking suitable steps to bring public opinion directly to bear upon the subject. But

an answer to the question more complete and satisfactory than any I can give is afforded by the action and words of Abraham Lincoln in relation to the Dred Scott decision. Mr. Lincoln believed the Dred Scott decision to be unsound as a matter of constitutional interpretation; and as a statesman he refused to be governed by it as a political rule; but he never denied its binding effect. He asserted that it remained open for the parties to a future suit where the same question might again arise, to attempt, by presenting new views of the question, to induce the Supreme Court to put a different interpretation upon the Constitution; or, failing that, to procure an amendment of the Constitution. By so doing, he said: "I disturb no right of property, create no disorder, excite no mobs." He elaborated this view as follows:

"Judicial decisions have two uses: first, to absolutely determine the cases decided; and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use they are called precedents and authorities. We believe as much as Judge Douglas (perhaps more) in obedience to and respect for the judicial department of government. *We think its decisions on constitutional questions when fully settled should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself.* MORE THAN THIS WOULD BE REVOLUTION."

Our history does not afford a more conspicuous example of an unqualified recognition of the necessity for avoiding incorrect decisions by those methods only which are clearly within the limitations of the Constitution. It has been said that Mr. Lincoln "actually applied in successful fashion the doctrine of

recall" to the *Dred Scott* decision. But everything he said in his debate with Douglas and in his first inaugural address shows that this is a clear misconception of his attitude; for he pointed out in the simplest and clearest language that he proposed to reverse the decision by methods clearly within the then existing provisions of the Constitution, and that he did not propose to resort, under any circumstances, to revolutionary innovations like the recall.

The objections to the recall of decisions are fundamental. They are based on the principles which cannot be surrendered without endangering our civil liberties. They cannot be overcome by guarded phraseology or by a multitude of provisos. Any one proposing a fundamental change of our constitutional law should be able to show clearly that it will not imperil the life, liberty or property of the American citizens either of to-day or of the future. The effect of radical changes of our fundamental law in any situation which a reasonable foresight may present to the mind must always be considered. In the wise and philosophical observations of Washington, Hamilton, Webster and Lincoln upon our Federal Constitution and its balances and restraints, their intellectual vision was not confined to their own age. They spoke from the standpoint of their study of two thousand years of history which taught that governments must be protected against the known tendencies of human nature. They had learned that popular governments where the people had failed to impose permanent restraints upon themselves had always proved houses built upon the sand, and that in the inevitable cataclysm it had been the individual of the minority who at the behest of the temporary majority was oppressed and deprived of his life, his property or his liberty. To give heed to these

lessons of history does not indicate a disbelief in the proposition that the people are, and must always continue to be, the only source of political power. Webster did not indulge in exaggeration when he asserted that "Whoever says, or speaks as if he thought, that anybody looks to any other source of political power in this country than the people, must have a stronger and wilder imagination (than Don Quixote), for he sees nothing but the creations of his own fancy. He stares at phantoms"; but, at the same time, he uttered a solemn admonition against "the sudden impulses of mere majorities," and said that it was the "great conservative principle" established by the American people, "in constituting forms of government, that they should secure what they had established against hasty changes by mere majorities." We must, therefore, not be deterred by the oft-repeated, but unfounded, charge that we do not trust the people and we must approach a consideration of the doctrine of the recall of decisions from the standpoint of historical instances, philosophical reflections and confidence in our institutions. We must not fail to deal with it seriously, because it appeals to many people sincerely seeking to improve social and industrial conditions, who have been misguided by partisan appeal; and our efforts must be unrelenting because the recall is pressed by persons whose influence in our community is so potent as to make even such a heresy, when advocated by them, a real menace.

The recall cannot be dismissed without grave consideration, merely because there is ground to think that it has been put forward for some temporary or ulterior political purpose; for it is too subtle, too plausible in its superficial aspects and too dangerous in those which lurk beneath the surface. It should be

combatted by every resource at our command. Especially should members of our own noble profession avoid being lulled into inactivity by their convictions that, because the recall is so revolutionary, therefore it is impossible; for the real character and effect of the doctrine is more clear to us than to those who have fewer occasions to consider the importance of maintaining the balance of the different parts of the Constitution. It will not do to content ourselves with reiterating the formula that the judiciary must be independent and the restraints of the Constitution must be preserved. We must be prepared also to give reasons and stimulate thought among the people. This is a task that the lawyer can perform intelligently, sympathetically and patriotically. He need surround the courts with no undue sanctity, for none better than he should know that judges are human, that in their administration of justice their acts should be subjected to the closest scrutiny, and that if their procedure is too slow or too expensive or too technical, it should be rigidly reformed. But he also knows that the preservation in our governmental system of an absolutely independent judiciary as a restraint upon the too impulsive or the too frequent exercise of the supreme political power is essential to the continued life of the nation; and he should not grow weary in conveying that message to his fellow citizens.

STATE CONTROL OF NAVIGABLE WATERS



XI

STATE CONTROL OF NAVIGABLE WATERS ¹

A RECENT issue of the *Review* ² contained a discussion of the decision of the Court of Appeals in the case of *Long Sault Development Company v. Kennedy*.³ A consideration of the effect of that decision upon the development of our waterways for commercial purposes may have some interest.

In 1907 the legislature passed an act incorporating the Long Sault Development Company and authorizing it to construct a gigantic dam across the St. Lawrence River, at the famous Long Sault Rapids.⁴ The project contemplated the expenditure of \$35,000,000 in the improvement of navigation and the creation of a water power capable of generating electrical energy to the extent of four or five hundred thousand horse power. Governor Hughes refused to sign the bill as it was first passed by the legislature because it did not provide for participation by the state in the profits of the enterprise. Accordingly it was redrawn so as to provide that after 1911 a minimum annual payment of \$25,000 should be made to the state, and that after the power plant was in operation the state should receive at the rate of 25 cents per electrical horse power generated in excess of 100,000 of such horse power. Thus amended the act was passed and signed by Governor Hughes. Besides paying annually the amounts prescribed by the act, the company has expended nearly

¹ Reprinted from *Columbia Law Review* for May, 1915.

² *Columbia Law Review*, 68.

³ (1914) 212 N. Y. 1. The case has been taken on writ of error to the Supreme Court of the United States.

⁴ N. Y. Laws of 1907, c. 355.

a million dollars in acquiring land and riparian rights, and in engineering and other expenses in preparation for the work of construction. The right of the company to commence work was expressly conditioned upon its obtaining the consent of Congress. Such consent has not been obtained, although the company has made efforts to obtain it.

In 1913, the legislature passed an act ⁵ purporting to repeal the charter of the company upon four grounds, three of which assert the unconstitutionality of the charter and the fourth that it was beyond the power of the legislature to authorize the transfer of land under the waters of the St. Lawrence River as they were held in a sovereign capacity.⁶ The Appellate Division of the Third Department found that none of these four

⁵ N. Y. Laws of 1913, c. 452.

⁶ "Section 1. Chapter three hundred and fifty-five of the laws of nineteen hundred and seven, . . . is hereby repealed, upon the following grounds:

"First. That chapter three hundred and fifty-five of the laws of nineteen hundred and seven is unconstitutional in that it contravenes section eighteen of article three of the state constitution, which provides that the legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

"Second. That the said act is unconstitutional in that it contravenes section seven of article seven of the state constitution, which provides that the lands of the state now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands, and shall not be leased, sold or exchanged, or taken by any corporation, public or private.

"Third. That the said act violates section sixteen of article three of the state constitution, which provides that no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in its title.

"Fourth. That the said act is invalid as being in excess of the powers of the legislature, in that it attempted to provide for the alienation of the state to the Long Sault Development Company of title to the land in the bed of the St. Lawrence River. The title of the state in those lands is a sovereign right rather than a proprietary title. It is inconsistent with that right, which must be exercised for the benefit of the whole people, that the title to the bed of a navigable stream should be granted in fee to a private corporation."

N. Y. Laws of 1913, c. 452.

grounds was adequate to justify the repeal; but it also held that the repealing act and another act passed at the same time taken together constituted a taking by right of eminent domain, and it therefore denied the relief asked for by the company.⁷ The Court of Appeals affirmed the order of the Appellate Division but based its conclusion exclusively upon a ground not specifically mentioned in the repealing act; namely, that it was attempted by the charter to transfer to a private corporation the control, not alone of the land under the water (which was of limited extent, being only that occupied by the works erected), but also the "entire control of navigation" at the Long Sault Rapids, and that it was beyond the power of the legislature to cede such control because thereby the state would part "for all time with its own power to improve such navigation." An extract from the opinion is given in a note.⁸

⁷ (1913) 158 App. Div. 398.

⁸ "It (the grant) virtually turns over to the corporation entire control of navigation at the Long Sault Rapids (provided, of course, that the consent of Congress can be obtained). All that the corporation must do is to construct the contemplated works, pay the stipulated sums and *keep the navigation as good as it is now*. No matter how much the interests of the public may demand the improvement thereof in the future, the state will be powerless to act either directly or by constraint upon the corporation. It is precisely as though the legislature should confer upon a corporation exclusive authority to construct works on the Hudson River to improve the navigation between Albany and Troy upon condition that such navigation shall be preserved in as good condition as the same is at present, and thereby preclude the state from ever hereafter improving the navigation itself. In my opinion the legislature cannot make such a contract in behalf of the state. In *Illinois Central Railroad Company v. Illinois* (146 U. S. 387) the attempted alienation of 1,000 acres of the harbor of Chicago was condemned on account of the extent of the area granted. Here the grant is objectionable on account of the abdication of the state's control over waters which are still to be preserved as navigable but which are to be turned over wholly to the dominion of a private corporation. In this discussion I assume that the improvement of navigation was a real, even if subsidiary, purpose of the enactment and not merely a cloak for a power development project. The point that I desire to emphasize

While conceding the power of the legislature to grant lands under water for beneficial uses which "can fairly be said to be for the public benefit or not injurious to the public," the court held that the grant to the Long Sault Development Company could not be sustained as being of that character because "no matter how much the interests of the public may demand the improvement thereof in the future, the state will be powerless to act either directly or by constraint upon the corporation. . . . Here the grant is objectionable on account of the abdication of the state's control over waters which are still to be preserved as navigable but which are to be turned over wholly to the dominion of a private corporation."

This doctrine as applied to the facts in the Long Sault case, if it shall be found not to violate any rights of the company secured by the Federal Constitution, will have a far-reaching effect upon the improvement by private enterprise of navigable streams in this state.

The facts are thus referred to by the court, *viz.*:

"As is generally known, the celebrated Long Sault rapids constitute a substantial obstacle to the navigation of the St. Lawrence for commercial purposes, being navigated by only one line of passenger boats during the tourist season. In the petition in this proceeding the effects of the proposed scheme on navigation are summarized as follows:

is that the legislature cannot authorize the conveyance of a navigable portion of the St. Lawrence to a private company to maintain and control navigation thereon, thereby parting for all time with its own power to improve such navigation. The privilege of the state to control the St. Lawrence as a navigable river (subject to the direction of Congress) cannot be assigned to others in the manner attempted by this legislation. As long as the waters are maintained as navigable they remain public waters of the state; and as long as they remain public waters of the state the state is bound to retain control over them in the public interest."

Long Sault Development Company v. Kennedy (1914) 212 N. Y. 1, 9.

“ ‘The river, which at Long Sault is now practically unnavigable, will become navigable for all classes of vessels. Both of the contemplated locks will be continuously operated during the navigation season toll free. Reliable and economical power will be made available within the radius of transmission of electricity from the power houses. New industries will thereby be created. There will be increased quantities of products from manufacturing plants utilizing the power, which products must be distributed by boat or rail.’ ”

Some question having been raised as to whether the proposed dams would improve navigation, the court stated that it assumed “that the improvement of navigation was a real, even if subsidiary, purpose of the enactment and not merely a cloak for a power-development project;” and this assumption was justified under the principle that such acts “are valid if it can be reasonably inferred from all their provisions that the improvement of navigation was their primary and principal object. No express declaration in the acts that such was the object and purpose of the legislature in enacting them, is required; nor is such a declaration usual in acts of a similar nature.”⁹

Neither the magnitude of the improvement as a power project nor the importance of the St. Lawrence River because of its size and international character were referred to by the court as exceptional circumstances in support of the broad doctrine laid down in its opinion; indeed, for the purpose of illustration, the court intimated that the same rule would be applied if the legislation had authorized works for the improvement of the navigation of the Hudson River between Albany and Troy; and, of course, the principle of the decision would be equally applicable to prevent a grant to a private corporation to improve the navigation of

⁹ *Tewksbury vs. Schulenberg* (1877) 41 Wis. 584, 593.

the Hudson in its upper reaches, or the Mohawk or any similar stream where the volume of water might be sufficient to make an improvement of navigation and the incidental water power a profitable enterprise. It may fairly be assumed that the legislature and Governor Hughes were of the opinion that specific provisions for the protection of navigation were unnecessary because, under the charter, no work could be commenced until the approval of the federal government had been obtained, and because that approval would insure: first, adequate provision in any special act of Congress for the protection of the public interests; second, the enforcement of all of the stringent provisions concerning the erection of dams in navigable streams contained in the Federal Dam Act, particularly that which vests in the War Department the power to determine what kind of a dam or similar structure may be constructed in a navigable stream; and, third, the permanent supervision by the federal authorities in the operation of all of the works so far as such operation might affect navigation.

Without adverting to the features of the Long Sault charter just mentioned, the court lays down the broad proposition that the state is without power to authorize a private corporation to build works in a navigable river for the improvement of navigation and to grant to it the irrevocable right to enjoy the water power incidentally created thereby, because the building, maintenance and control of such works necessarily involve the control of navigation and preclude for all time the exercise by the state of "its own power to improve such navigation." The court draws a distinction between cases on the one hand where the state surrenders its control of navigation by granting the right to build and maintain dams, locks and similar

works, and those on the other hand where the structures authorized are piers, bridges or other similar structures in public waters designed to facilitate the operations of commerce. Without doubt the building of a dam which changes the water level of a navigable river and forces vessels to use locks and canals, involves a more direct and complete control over vessels using the river than piers, bridges or similar structures which may legally occupy, to the exclusion of others, a limited portion of the navigable portion of a river; but it has not heretofore been supposed that the two kinds of grants differed except in the extent that they involved interference with navigable waters in their natural state.

Where navigable streams in the State of New York have been developed for water-power purposes, the work has usually been done by private companies, or individuals under authority granted by the legislature. A condition for the improvement (or even the preservation) of navigation has sometimes, but by no means always, been imposed. The practice prior to 1840 differed materially from that prevailing since 1882, as is explained in a note.¹⁰ Generally since 1882, the legis-

¹⁰ By a general dam act passed in 1813 (Chapter 47) the legislature made separate grants to a number of individuals to erect dams in certain rivers declared by the act to be public highways. These grants were for a limited period and were made subject to certain restrictions designed to prevent any obstruction to navigation, which was to be free from the payment of tolls. From 1813 to 1840 the legislature passed more than 125 special acts granting to individuals the right to build dams in certain streams which were navigable or capable of being developed for navigation. Generally these grants were made subject to one or more of the following conditions, viz.: (a) That the court could revoke the grant if the dam proved to be an inconvenience to the public; (b) that the grant could be repealed without liability for damage or compensation to the grantee whenever the public interest might require; and (c) that the act should become void if passage upon the stream was obstructed by the dam.

In over forty years, between 1840 and 1882, there were but few special acts granting the right to build dams. Since 1882, however,

lative acts besides authorizing the erection by private corporations of dams and power plants have provided for the grant to such corporations of the interest of the state in the land under water covered by the dams and other works. It has been supposed that such acts created franchises, entitling the grantees to have the beneficial use of the water power, and that they could not be deprived of such franchises without compensation.

The industrial requirements of this state do not seem to have led to the extensive development of its waterways by artificially increasing their navigability. Undoubtedly this has been due in part to the extensive development of the canal system. State canals are frequently fed by the waters of potentially navigable

the legislature has passed about twenty special acts granting the right to certain waterpower companies (and in a few cases to individuals) to erect dams across some of the larger streams of the state, such as the Hudson and Mohawk rivers.

The provisions of these acts were different from those of the acts passed prior to 1840 in the following particulars, viz: No right of repeal was reserved; there was no express condition that the navigation was to be improved, in some cases it being provided that navigation should not be injured, in others the subject not being mentioned at all; generally there was no condition for the resumption by the state of control of navigation; in some cases the use of the land under the water covered by the dam, and flooded by its erection was given to the grantee and in some cases the legal title was conveyed to it; and there was no limitation as to the time of enjoyment and in five cases the right was granted to maintain the dam "forever."

The dams constructed before 1840 were probably not of expensive or elaborate construction but were built and used to create water power for the operation of sawmills and grist mills belonging to grantees owning the lands and riparian rights in the immediate vicinity. At that time the needs of navigation were not rapidly developing and the grantees were, therefore, not deterred by the limitations imposed by the legislature from making the expenditures necessarily involved. The companies receiving grants made since 1882, however, have been organized for the purpose of developing waterpower to be converted into electrical energy for the operation of extensive modern manufacturing plants. Such enterprises involve the building at large expense of masonry or concrete dams and they would not be undertaken if the right to maintain the dams were to be made subject, at the will of the legislature, to termination without compensation. These circumstances perhaps explain the change of legislative policy since 1882.

rivers which are themselves left in their natural state, or even depleted to supply the canals. This condition is different from that prevailing in other states where important industries make transportation by water of the highest importance. In such states statutes frequently provide for the improvement of waterways by private corporations which, in consideration of bearing the expense, are given the right in perpetuity to collect tolls from vessels making use of the improved facilities. The constitutions of some states forbid the expenditure of public moneys for such improvements; and there the navigability of waterways must be improved by private enterprise, or not at all. In states where the facilities of navigation have been managed by private improvement companies, and tolls have been imposed upon commerce for the use thereof, it has not been regarded that the control of navigable waters necessarily resulting from such an arrangement has been inimical to the public interest.¹¹

The rights of such improvement companies were dealt with by the Supreme Court of the United States in the case of *Monongahela Navigation Company v. United States*.¹² The Monongahela River in its natural state was navigable to a very limited extent and not at all seasons. The commerce upon the river was small. The Navigation Company, under authority of a special act of the legislature of Pennsylvania, constructed a series of seven dams and locks, whereby the river was made navigable for large steamboats at all seasons of the year and facilities were furnished for an extensive commerce. The United States Government for the purpose of still further improving the navigation of the river, and under its constitutional power to

¹¹ Farnham, "Waters and Water Rights," 384.

¹² (1893) 148 U. S. 312.

regulate commerce, sought to take possession of one of the dams and locks constructed by the Navigation Company. It was contended that the company had acquired from the state a vested right to collect tolls, of which it could not be deprived by the United States without due compensation. This point was sustained by the Supreme Court, which said:

“That, in the absence of congressional action, the State of Pennsylvania had the power, either acting itself or through a corporation which it chartered, to improve the navigation of the river by means of locks and dams, and also to authorize the exaction of tolls for the use of such improvements, are matters upon which there can be no dispute, in view of the many decisions of this court.”

The court further held that neither the state nor the United States could “say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company”; and that while the federal government had the right to acquire the improvements if they had been made “under authority of a charter granted by the state with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account.” The court took the view which it had previously expressed in its decision in *Huse v. Glover*,¹³ that improvements to navigation made by the construction of dams and locks were like wharves and docks constructed to facilitate commerce. Finally the court said:

“The theory of the government seems to be, that the right of the Navigation Company to have its property in the river,

¹³ (1886) 119 U. S. 543, 548.

and the franchises given by the state to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual."

Commissioners of the Sinking Fund v. Green and Barren River Navigation Company,¹⁴ is another well-considered case in which the same subject was dealt with. The Navigation Company was incorporated by an act which set forth that the state had constructed locks and dams on Green River necessitating large expenditures and that the state being largely in debt and wishing to avoid further expense, had transferred the line of navigation to the Navigation Company which undertook to maintain it in repair. The lease was for thirty years, the line to be open to all vessels on payment of the toll to the company. Twelve years after the act of incorporation was passed a repealing act was passed terminating the lease and revoking the right to collect tolls. The action was commenced to put the state in possession. It was argued that a navigable stream was public property which could not be disposed of by the state.

The court says, by Pryor, J.:¹⁵

"The state has the same power to improve its navigable

¹⁴ (1880) 79 Ky. 73.

¹⁵ At p. 78.

streams that it has any of its highways; and when it becomes necessary to extend the line of navigation for the purpose of developing the resources of the state, or to facilitate trade and commerce, the state may contract with individuals or corporations for the construction of such improvements, and as a consideration therefor, transfer to them the tolls arising from its navigation."

And again: ¹⁶

"When the property of the citizen is taken in the exercise of this sovereign power, the legislature may confer on a corporation the right to charge tolls in consideration of its being placed in a condition for public use; but when the state is already in possession of its navigable waters, and no condemnation is requisite or compensation required, it is attempted to be maintained that no such power can be exercised, and our navigable rivers are to remain unimproved, or the improvements already made permitted to decay for the reason that the state is unwilling to burden the citizen with taxation for that purpose, and is denied the power to permit the improvement to be made by others, for no other reason than that the law of nature has already appropriated them to public use.

"The fallacy of this reasoning, if followed, would prevent the state from placing a dam in the river that might tend to prevent its free use by the citizen who was unable to pay the toll."

The court goes on to say that the state could resume control of the improvements when public necessity demanded it, on payment of just compensation to the corporation.

These two cases may be said to be typical. A number of decisions dealing with similar cases are referred to in a note.¹⁷ In all such cases the state governments

¹⁶ At p. 79.

¹⁷ *Veazie v. Moor* (1852) 14 How. 568: The State of Maine conferred on a corporation the exclusive right of navigation on a portion of the

have been "powerless to act either directly or by constraint upon the corporation" for the improvement of navigation except by proceeding under the power of eminent domain to acquire the control of navigation ceded by legislative grant to private corporations.

The method proposed for compensating the Long Sault Company for the expense of the works authorized by its charter was not, as in the Monongahela case, by a grant of the right to collect tolls, for the use of the locks was to be free, but by a grant of the privilege of using and selling the power generated by the surplus waters collected above the dam. This difference would not seem to affect the principle of the decision. The plan of compensation adopted in the Long Sault case has had the sanction of legislative practice in this state for many years. In one of the legislative grants made since 1882,¹⁸ an act of the legis-

Penobscot River located entirely in the State of Maine. An injunction was granted by the state courts excluding the boats of another company from navigating on the portion of the river in question. The decision was held not in conflict with the commerce clause of the Federal Constitution.

Carson River Lumbering Company v. Bassett (1866) 2 Nev. 760: An act entitled "An act for the Improvement of the East Branch of Carson River" gave an exclusive right to the use of the river, within certain points which were to be improved. This act was held valid in an action on contract to recover for the use of the river by another company.

McReynolds v. Smallhouse (1871) 71 Ky. 447: The state had expended large sums in improving the navigation on a part of the river, and turned this portion of the river over to a corporation which was to maintain it and collect tolls. The constitutionality of the act was attacked on the ground that "No man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services." But the act according to the right to collect the tolls was held valid.

See also *Cohn v. Wausau Boom Company* (1879) 47 Wis. 314.

¹⁸ The Genesee River Company was organized under the provisions of Chapter 605 of the New York Laws of 1898. The act first recited that it was necessary "for the improvement and preservation of the public health, for the checking of floods, for the furnishing of water for the enlarged Erie Canal, and for the supplying of pure and wholesome water for municipal purposes" that the land described in the act should be taken "for the public uses aforesaid," and that "in the judgment of this

lature specifically recited that certain necessary public purposes which could be accomplished by the development of the Genesee River ought not to be undertaken at public expense and therefore the Genesee River Company was organized and was, in consideration of constructing the necessary works at its own expense, granted the beneficial interest in the water power incidentally made available by the erection of the dam, which was the principal feature of the works.

Before the passage of the Long Sault act there had never been a case where provision had been made for participation by the state in the profits of a water power plant constructed in a public stream by the authority of the legislature.¹⁹ This feature of the Long Sault charter was no doubt a result of the growth of the modern idea that the state is entitled to, and should reserve to itself, a participation in the profits of the development of all its natural resources.

The transfer to a private corporation of the right to use and sell power as compensation for the building of a dam in a navigable river was considered by the Supreme Court in *Kaukauna Water Power Company v.*

legislature" the compensation to be paid for such land should not be made by the state but that the public purposes indicated should be attained as prescribed in the act and by the organization of the corporation created by the act. The company was authorized to build a dam across the Genesee River and was given "the right to utilize all the waterpower incidentally created by the construction of said main dam or reservoir" and to construct certain other structures "for the development of hydraulic and electrical power and for the purpose of making and transmitting compressed air and for other purposes." The company was authorized to sell all water and electrical power generated at the dam for its exclusive benefit. There was no limitation upon the period of enjoyment of the rights granted by the act, and no control of navigation of the stream was reserved.

¹⁹ A similar provision was made in the case of The Clinton Mills Power Company which was authorized by Chapter 514 of the New York Laws of 1911 to rebuild and maintain a dam across the Susquehanna River not exceeding ten feet in height, at a place where the right to build a dam had been granted in 1813 to certain individuals. The

*Green Bay and Mississippi Canal Company.*²⁰ When Wisconsin was admitted to the Union, the Federal Government granted to it lands, the proceeds of which were to be used in improving certain waterways of the state. A corporation was organized under state legislative authority and with the proceeds of lands granted to it, it constructed dams and other works in the Fox River—a navigable stream. These works were subsequently purchased by the United States, but the right to use the waters not needed for navigation purposes was not transferred. A question arose between the grantee of the right to use these surplus waters and a riparian owner. It was held that the riparian owner had no rights, since the construction of the dam was undertaken by the state and to reimburse itself it was entitled to dispose of the right to use the surplus water for power purposes. The court said that if the sole purpose of the improvement was to create a water power to be leased for manufacturing purposes, the state would probably not have the right to destroy, without compensation, riparian rights, but added that there was nothing objectionable in permitting the state to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement. The court further said that

“ . . . where the surplus thus created was a mere incident to securing an adequate amount of water for the public im-
grant was for fifty years and during that time the state was to receive 75 cents per horsepower produced, that amount to be readjusted every five years. The act contained certain provisions protecting “mills now operating higher up on said stream,” and was declared to be “a public act, and the land flowed with water as herein provided is hereby declared to be for public use.” There was no provision, however, reserving to the state the right to improve or control navigation or giving the public any compensatory advantage except that referred to above. Some of the provisions of the act were obviously suggested by the Long Sault charter.

²⁰ (1891) 142 U. S. 254.

provement, such legislation, it is believed, has been uniformly sustained. . . . The dam was built for a public purpose, and the act provided that if, in its construction, any water was incidentally created, it should belong to the state, and it might be sold or leased, in order that the proceeds of such sale or lease might assist in defraying the expenses of the improvement.”

An arrangement such as that referred to by the court might be regarded not so much as constituting a franchise as being a public contract made by the state for the erection of works to improve navigation, the water power incidentally created being used to defray the cost. The water power is, so to say, a by-product of a public improvement to be disposed of for the public benefit. As was said by the Supreme Court later, in *Green Bay & Mississippi Canal Company v. Patten Paper Company*,²¹ referring to the same legislation which was under consideration in the *Kaukauna Company* case, the legislation “has had in view the dedication of the water powers incidentally created by the dams and canal to raising a fund to aid in the erection, completion and maintenance of the public works.”

Since the Court of Appeals based its conclusions in the Long Sault case upon principles established in *Illinois Central Railroad v. Illinois*,²² some reference to that case should be made. A grant had been made by the Illinois legislature to the railroad company for railroad purposes, which included certain lands under the waters of Lake Michigan, and in addition thereto land under water constituting “nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or

²¹ (1898) 172 U. S. 58.

²² (1892) 146 U. S. 387.

exclude the legislature from regulating the rates of wharfage or dockage to be charged." The effect of the act, as the court said, was to vest in the railroad company the power "to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally." There was practically an "abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake." Only a small portion of the thousand acres attempted to be conveyed was needed for the enjoyment by the railroad company of its franchises. Under such circumstances the court said that "it would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself." A similar question arose in *Coxe v. State*,²³ where, under the guise of an act to authorize the drainage of marsh lands, there was authorized a conveyance by the state to a private corporation of all of the land which the corporation chose to designate under the waters of the ocean or of the sound within the limits of the counties of Kings, Queens, Richmond and Suffolk, excepting such land as was within the limits of the city of Brooklyn. This description would cover a water-front line of probably several hundred miles along the shore of Long Island. There was no definite public purpose expressed in or to be inferred from the act as a basis for the grant, and the court justly characterized the proposed grant as being of "extravagant magnitude," and said that there was nothing in the act "to indicate that the grant was for any public purpose." It added, however, that "for every purpose which may

²³ (1895) 144 N. Y. 396.

be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms."

Grants of public lands have heretofore been held to be beyond the power of the legislature only in extreme cases like the two just referred to. In the Long Sault case, however, the Court of Appeals has taken the view that, although the proposed improvement would constitute an improvement to the navigation of the St. Lawrence River, yet the permanency of the improvement and the character of the right of the Long Sault Company to enjoy in perpetuity the incidental advantage accruing from the use for power purposes of the surplus water flowing over the dams, were of such a character and extent that there was vested in a private corporation such a control of the navigation of the river that the state itself was precluded from resuming such control when, for the benefit of the public, it might deem it necessary to do so for the improvement of navigation. The charter of the Long Sault Company makes no express grant of such control, and the conclusion of the court was based upon what it regarded as a necessary implication from the character and extent of what was granted. But upon this point, it is not to be overlooked that upon the completion of the dams according to the plans prescribed by the federal government, the company is obliged to operate the locks *for the purpose of accommodating all shipping making use of the river and without compensation.* In view of the obligation thus imposed it is difficult to see how the state can reasonably be said to be deprived of any control which it would still be entitled to exercise after the federal government had approved of the improvement and had thus exercised its right to control naviga-

tion under the commerce clause of the Constitution. For the company would not then have the right to interpose objections or impose burdens upon navigation, nor would either the federal or the state government, in any respect, lose control of such navigation, except so far as the control of the state would disappear when the federal government acted. Judge Collin has very fully considered this point in his dissenting opinion, viz.: ²⁴

“It [the company] could not enter upon or interfere with the river, under the act, until Congress had sanctioned its proposed works by authorizing the construction of the dams, locks and canals. This, of necessity, implies accurate and complete Congressional knowledge of the character, location, extent and effects of those authorized structures. Until Congress had acted in the matter, the state had the unbounded and unrestricted right to exercise and effectuate its judgments in improving the navigability. . . . The act did not to any extent impede or shackle the state. It did not give to the corporation or take from the state any control whatsoever of the navigation. The state remained in so far as the act was concerned, as free and powerful to work its will, in the public interest, in regard to the river and its navigation as it was before the act was passed or would have been in its absence. There was no provision in the act which stayed the hand of the state pending the action of Congress in the matter or which directly or through reasonable implication fettered or withdrew, or turned over to the corporation, to any extent or in any particular the control held by the state, at the passage of the act, of navigation or the waters desired therefor. There was no language in it which would have branded as illegal or unfair whatever action concerning navigation the state might have taken. The control of navigable waters, if alienable at all, should only be so by an instrument showing a clear and undoubted intention on

²⁴ At. p. 25.

the part of the legislature to that end. The act in this regard was, in effect, the grant of such land under the water as the structures approved and authorized by Congress should cover, and of the right to use for a water power such surplus water as navigation regulated and controlled by Congress should not require, the grant, however, to have and take no effect until Congress had acted in the matter. Whenever Congress acted in the matter, it drew and retained unto itself exclusive and paramount control over the navigation and waters of the river for that purpose. Thereafter and thereupon such control was vested exclusively in Congress, by virtue, not of the act, but of the authority delegated by the state through the Federal Constitution."

Precisely how the decision in the Long Sault case will affect the development of the waterways of the state for power and navigation purposes it is difficult to predict. Future legislation may, perhaps, contain express provisions that the state shall retain control of navigation, operating the locks and other artificial devices for the accommodation of shipping, and collecting any tolls charged for the use of such facilities. It might even be provided that the state authorities should have the right, whenever they were of the opinion that the public interest required it, to take possession of the dams and power plants connected therewith and that this could be done without compensating the corporation which had constructed them. By such restrictive provisions the dangers referred to by the Court of Appeals in the Long Sault decision would be avoided. From the standpoint of the public interest, however, the important question is how far such provisions would interfere with the development of rivers for power and navigation purposes. Certain it is that they would mark a change in the policy of this state during the last thirty years; for power

companies have, during that period, been induced to improve at large cost navigable streams because of the anticipated profit from the sale of water or electrical power. Such companies can hardly be expected to continue to make such improvements if their right to have the beneficial enjoyment of them can be taken away without compensation; and under such circumstances the improvement of the waterways, whether for the development of power or the improvement of navigation, would have to be undertaken at the public expense. Legislation to accomplish that result is now receiving considerable attention from the people of this state. Whether under the power given by such legislation the improvement of our waterways, if made at the expense of the public, would proceed fast enough to keep pace with the modern demands of commerce, and whether power plants could be profitably or efficiently operated by the state, are questions of state policy as to which opinions will differ and which are beyond the scope of this article. In the case of the Long Sault project, however, it is inconceivable that the people of the state would tolerate the expenditure of any considerable sum merely to improve the navigation of the St. Lawrence, and it is scarcely more probable that they would approve an increase of the debt of the state by the enormous sum of \$35,000,000 in order to go into the business of producing water power to be sold to the industries of the state. It seems a safe prediction that if the Long Sault project is not undertaken as a private enterprise, it will never be undertaken at all.

How far power projects which have been heretofore carried out under authority of legislative acts (particularly those passed since 1882), and have involved the use of navigable or potentially navigable streams, may

be affected by the Long Sault decision because the grants have expressly or by implication thrown the control of navigation into the hands of private corporations, need not be particularly inquired into. Suffice it to say that the decision creates doubt as to whether some of the grants recently made which are similar in character to that made to the Long Sault Company, may not, under the principle announced in the decision of the Court of Appeals, be made the subject of attack, since many of these grants, by implication no less strong than that made by the court from the Long Sault charter, seem to have conferred upon the grantees control of navigation.

THE TOBACCO TRUST DECISIONS

XII

THE TOBACCO TRUST DECISIONS ¹

THE decisions of the Supreme Court of the United States in the Tobacco Trust cases ² mark the opening of a new phase in the enforcement of the Interstate Commerce and the Sherman Anti-Trust Law. They also set at rest three highly interesting and important constitutional questions never before presented to the court.

The first of these questions relates to the extent and character of the inquisitorial power of a grand jury under the Fifth Amendment of the Constitution. That amendment provides that no person shall be held to answer for an infamous crime "unless on a presentment or indictment of a grand jury." It was claimed that by this provision the powers of a grand jury were limited to those possessed by that body under the common law, and that it could only act after a bill of indictment had been submitted to it. That it had power, in the absence of a specific charge, to inquire whether a crime had been committed and, if so, who committed it, was vigorously denied. The Supreme Court, however, unanimously held that, under the practice almost universal in this country since the adoption of the Constitution, a grand jury has broad inquisitorial powers, and that upon knowledge acquired either by the observations of its members or by the evidence of witnesses, it may indict, even though a specific charge against a particular person has not previously been before it. Authority is thus given for a general

¹ Reprinted from the *Columbia Law Review* of June, 1906.

² *Hale v. Henkel* and *McAlister v. Henkel*, decided by the United States Supreme Court, March 12, 1906.

investigation by a grand jury when it receives information from any source which points to the probability that some crime has been committed, even though the criminal and the exact circumstances of the criminal act are not known either to the prosecuting officer or to the grand jury itself.

The second point decided by the court is that an officer of a corporation may not, in its behalf, plead a privilege under the Fifth Amendment upon the ground that his answers may tend to incriminate the corporation. This conclusion is based upon the view that the constitutional privilege against self-incrimination is personal to the witness and may not be asserted in behalf of another. It was also decided that the Immunity Act of 1903 applied to a proceeding before a grand jury, and prevented a witness from asserting the privilege of the amendment in his own behalf, the act affording him full protection from prosecution on account of anything that he should testify to.

The remaining point settled by the decisions is that the production by an officer of a corporation, under a subpoena *duces tecum*, of documentary evidence belonging to the corporation may not be objected to, except in case of an abuse of the writ, either on the ground that under the Fifth Amendment such evidence would tend to incriminate the corporation, or that under the Fourth Amendment such compulsory production would constitute an unreasonable search and seizure of the effects of the corporation. It was said in support of this conclusion that there is a reserved right in the government to require a corporation to disclose whether it has abused its privileges and franchises enjoyed in connection with commerce among the several states.

That questions like these have not been decided be-

fore may seem strange; but a glance at the history of anti-trust and interstate commerce litigation affords an explanation.

The Interstate Commerce Law¹ was passed in 1887 and the Sherman Law² in 1890, and since they went into effect there have been comparatively few efforts to enforce the criminal remedies which they prescribe. Both Republican and Democratic administrations have generally considered it sufficient to resort only to the civil remedy of injunction. The Sugar Trust (Knight),³ the Kansas City Stock Yards,⁴ the Addyston Pipe,⁵ the Trans-Missouri Freight Association,⁶ the Joint Traffic Association,⁷ and the Northern Securities cases⁸ were suits for injunctions in which the court had to consider specific and easily proven agreements. In none of those cases was the policy of suppressing the facts resorted to by the defendants, for the reason, probably, that the corporations relied upon the contention that, even conceding that they had made the agreements, they were not in violation of the law. It has been mainly since the law has come to be better understood that notable instances have occurred where great corporations have resorted to obstructive measures which would, if successful, make it difficult or impossible to procure evidence by which the legality of their acts may be tested. Questions like those involved in the Tobacco Trust cases were not at first seriously pressed.

¹ 24 U. S. Stat. at Large 379.

² 26 *Ibid.* 209.

³ United States v. Knight (1895) 156 U. S. 1.

⁴ Catting v. Kansas City Stock Yards Company (1901) 183 U. S. 79.

⁵ Addyston Pipe and Steel Company v. United States (1899) 175 U. S. 211.

⁶ United States v. Trans-Missouri Freight Association, (1897) 166 U. S. 290.

⁷ United States v. Joint Traffic Association (1898) 171 U. S. 505.

⁸ Northern Securities Company v. United States (1904) 193 U. S. 197.

The scope and effect of the decisions will be better understood from a fuller statement of the facts upon which they were rendered, and of the views expressed in the opinions of the court.

Licorice is an indispensable ingredient in the manufacture of tobacco. Its importation from Syria and the Orient, where it is grown, and its sale in this country are under the control of the MacAndrews & Forbes Company, one of the affiliated companies of the American Tobacco Company. Independent tobacco manufacturers assert that the latter company fixes for them a burdensome price and limits the amount which they may buy, while discriminating in favor of the trust companies. Under these conditions the price of licorice to the independent manufacturers has about doubled. The government sought to ascertain from Mr. Hale, the secretary of the MacAndrews & Forbes Company, whether these results were brought about by any agreement, combination or arrangement in violation of the law. He refused either to answer questions or to produce the books and documents of his company, and Circuit Judge Lacombe, upon a presentment by the grand jury, committed him for contempt. Hale obtained a writ of *habeas corpus*, and from the order of Judge Wallace discharging the writ, he appealed to the Supreme Court.

The McAlister case presented practically the same question of law as the Hale case. McAlister was the secretary of the American Tobacco Company. The grand jury was proceeding against that company and the Imperial Tobacco Company, which is a company occupying in England a position in the trade similar to that of the American Tobacco Company here. The subpoena required the production of certain agreements made in 1902, which allotted to the British Company

all of the English business and to the American Company all of the American business, a reservation being made that the British Company could enter the American field, but only for the purpose of purchasing tobacco leaf. The agreements further provided that the Imperial Company should act as sole agent in England of the American Company for the sale of Havana and Porto Rico cigars and cigarettes (subject to the significant exception "that if at any time the prices of cigars or cigarettes sold to any country not affecting British trade shall be temporarily reduced for the purposes of competition, such local and temporary reduction is not to be taken into account for the purpose of fixing the price of cigars and cigarettes sold to the Imperial Company"), and that the services of the Imperial Company as agent would be satisfactory if it should sell seventy-two per cent. of the total annual importations into the United Kingdom, this provision being based upon the "belief and assumption that the American Company and its affiliated companies control, or will shortly control, not less than eighty per cent. of the aforesaid annual importations."

Counsel for Hale and McAlister contended, as already stated, that an officer of a corporation could assert, in behalf of the corporation, the privilege under the Fifth Amendment. On the other hand, the government claimed that the historical origin of that amendment shows that it was only designed to save a witness from being placed at a disadvantage on the witness stand through confusion or ignorance or anxiety, and from being thus led to make ambiguous or suspicious statements; that the rule was adopted to avoid the demoralizing effect on the administration of justice of a resort to browbeating and abuse, and, perhaps, to some form of torture; that the immunity was designed to

encourage persons to come forward and volunteer their testimony; and, finally, that none of these considerations made it appropriate to apply the rule for the benefit of a corporation. Adopting this view the Supreme Court held that "the right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. . . . The question whether a corporation is a 'person' within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."

This view of the court is in accord with the tendency of modern judicial opinion. Chief Justice Appleton, speaking of the privilege, said that "the interests of justice would be little promoted by its enlargement." Judge Thompson said still more emphatically "But such a maxim has no place in an enlightened and humane system of jurisprudence. We have outgrown it." And Professor Wigmore, in his admirable treatise upon the law of evidence, speaking of the privilege, said:

"We are to respect it rationally for its merits, not worship it blindly as a fetish. . . . Indirectly and ultimately it works for good—for the good of the innocent accused and of the community at large. But directly and concretely it works for ill—for the protection of the guilty and the consequent derangement of civic order."¹

¹ 3 Wigmore on Evidence 3101.

And again the same author says:

“To invoke the sentiments of lofty indignation and of courageous self-respect against the arbitrary methods of royal tyrants and religious bigots, holding an inquisition to enforce cruel decrees of the prerogative, and torturing their victims with rack and stake, is fitting and laudable, and moves men with a just sympathy. But to apply the same terms to the orderly, everyday processes of the witness stand, in a community governing itself in freedom by the will of the majority and having on its statute book no law which was not put there by itself and cannot be repealed to-morrow—a community, moreover, cursed above others, by constant evasion of the law and by overluxury of criminal procedure—this is to maltreat language, to enervate virile ideas, to abuse true sentiment, to degrade the Constitution, and to make hopeless the correct adjustment of the best motives of human nature to the facts of life.”¹

The remaining question decided by the court, viz., whether the Fourth Amendment, prohibiting “unreasonable searches and seizures,” could be availed of by a corporation through one of its officers commanded by a subpoena *duces tecum* to produce its papers and documents, recalls two of the most interesting crises in the events leading to the establishment of the principles of Anglo-Saxon liberty. The famous Wilkes agitation was aimed at the practice whereby the Secretary of State, an officer of the English crown, assumed to issue general warrants to search the premises of persons suspected of criminal libel for the purpose of discovering evidence. The decision of Lord Camden, in *Entinck v. Carrington*,² denounced such warrants as in violation of the principles of English constitutional law. At about the same time a similar agitation

¹ *Ibid.* 3107.

² (1765) 19 State Trials 1030.

arose in Massachusetts in opposition to the issuance by the courts of writs of assistance to custom-house officers enabling them to search suspected places for smuggled goods. It was in *Paxton's Case*¹ that Otis delivered his famous speech in opposition to such writs, and the insistence of the crown upon their validity was one of the principal grounds of complaint by the colonists against the rule of Great Britain in this country. The Fourth Amendment is an embodiment of the principles established in England in *Entinck v. Carrington*, and in this country by the Revolution.

It was contended by the government in the tobacco cases that the principle underlying the Fourth Amendment did not limit the power of the judiciary, proceeding in the ordinary way through a writ of subpoena *duces tecum*, to compel the production in court of documentary evidence, that writ having existed from time immemorial in England and long before the general warrants denounced in the Wilkes case had come into use. Without such writs, as was said in a leading case, it would be "utterly impossible to carry on the administration of justice." The Supreme Court adopted that view. But it went still further and held that in respect of the production of books and papers in court there was a clear distinction "between an individual and a corporation and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him.

¹ (1761) Quincy's Mass. Reports 51 and Appendix 395.

He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. . . .

“Upon the other hand, the corporation is a creature of the state. It is to be presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.” The court further held that while the franchises of a corporation might be derived under the laws of one of the states, yet such franchises were to be exercised in subordination to the power of Congress to regulate commerce, and added:

“In respect to this, the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own

laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state."

The court said that it did not intend to intimate that the general government "has a general visitatorial power over state corporations," but added that it did not wish to be understood "as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

Mr. Justice Harlan and Mr. Justice McKenna concurred in the opinion of the majority of the court, but held that the protection of the Fourth Amendment did not extend to corporations in any case and also expressed somewhat different views of the question whether the subpoena *duces tecum* in the Hale case was too broad and indefinite.

Mr. Justice Brewer wrote a dissenting opinion in which the Chief Justice concurred. These justices held that the immunities and protection of Articles Fourth, Fifth and Fourteenth of the Amendments to the Federal Constitution are available to a corporation "so far as in the nature of things they are applicable," although they agreed with the majority of the court that the protection accorded by the Fifth Amendment is personal to the individual and does not extend "to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal." But Justice Brewer referred to the cases holding that the word "person" used in the Fourteenth Amendment included corporations and concluded that it must also include "corporations when used in the Fourth and Fifth Amendments." The dissenting justices also held that while a power of supervision of a corporation did exist, yet it belonged solely to the state by which

it was chartered and that in such case the national government had no power of supervision or investigation.

The court has never before had occasion to express its opinion upon the question thus decided. It has always been supposed that Congress could, under the commerce clause of the Constitution, require corporations to comply with statutory regulations as conditions precedent to their engaging in interstate trade, as, for instance, that they should subject their books and papers relative to interstate trade to examination by an administrative officer of the government. But it has never before been decided that the fact that a corporation has, without an express franchise from the national government, engaged in trade among the states, imposes upon it an obligation in a judicial proceeding different from that resting upon an individual in similar circumstances to disclose its affairs. The importance and far-reaching effect of the decision cannot be overestimated and it must inevitably result in making the subjection of state corporations engaged in interstate trade to the authority of the national government much more complete than it has hitherto been.

A matter of great interest from the legal and historical standpoint is revived by the reference of the court to the famous opinion of Mr. Justice Bradley in the *Boyd*¹ case. In that case the federal government sought to obtain certain documentary evidence in a suit to recover a penalty under the revenue law, which provided that the court on motion of the government's attorney should have power to require the defendant to produce in court his private books, invoices and papers, and that on failure so to do the allegations of the government's attorney should be taken as confessed. Justice Bradley held that this constituted an

¹ *Boyd v. The United States* (1885) 116 U. S. 616.

unreasonable search and seizure in violation of the Fourth Amendment and was also in violation of the Fifth Amendment in that it compelled a person to be a witness against himself in a criminal case. It was not necessary for the decision of the case to hold more than that there had been a violation of the privilege of the Fifth Amendment; and upon this ground alone Mr. Justice Miller and Chief Justice Waite concurred in the judgment of the court. Justice Bradley, however, said that the two amendments "run almost into each other" and that they "throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. . . . And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

But as has been pointed out before, the Fourth and the Fifth Amendments had entirely different historical origins. The protection of the Fifth Amendment is complete without any resort to the Fourth Amendment. It had been recognized at least a century before the occasion arose for the principle of the Fourth Amendment. Wilkes was obliged to resort to the law against unlawful searches and seizures only because, as the incriminating documents had been taken from his possession, he was given no opportunity as a witness to object to their use as being in violation of his privilege against incrimination. Furthermore, the seizure of the papers in the Wilkes case was not under an order of the court, but under executive authority. In the

Boyd case, however, the statute without compelling the production of the papers declared that the failure to produce them should create a conclusive presumption of guilt. This was clearly in violation of the Fifth Amendment. But there was no reason for resorting to the Fourth Amendment, or, in the words of Professor Wigmore, attempting "to wrest the Fourth Amendment to the aid of the Fifth." Justice Bradley in effect rested his conclusion upon the proposition that objection to the admission of evidence could be based upon the illegal method by which it was obtained. But the Supreme Court has since decided the contrary.¹ Nor is the motive with which illegal evidence is obtained a ground of objection. In the Wilkes case the motive was no doubt to obtain incriminating evidence, but the illegal act was committed before the evidence was offered in court. As is said in May's "Constitutional History of England," the objection was that the ministers of the crown did not wait "to inquire after the accustomed forms of law." Often, if not generally, a warrant of search or seizure is for the very purpose of obtaining incriminating evidence. The Fourth Amendment recognizes that such a search and seizure may be reasonable and lawful.

The two amendments, then, do not "run almost into each other," nor does the one amendment throw light upon the other. The Fourth Amendment does not help out the Fifth Amendment merely because a search or seizure which is unreasonable is declared to be unlawful, nor does the Fifth Amendment help out the Fourth Amendment by permitting the search or seizure to be declared unreasonable upon the grounds of incrimination. The contrary expressions in the Boyd

¹ Adams v. New York (1903) 192 U. S. 585.

case were not necessary to the decision of that case.

Furthermore, in the Baird case,¹ which was not very different in its facts from the Hale case and where the objection was urged that an officer of a corporation should not be required to produce the books of the corporation, the court said that "the testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure."

The decisions in the Adams case and the Baird case thus seem to make the decision in the Boyd case rest alone upon the Fifth Amendment and prevent the extension of the Fourth Amendment beyond the limits justified by its historical and political origin.

These views were urged upon the Supreme Court in the Hale and McAlister cases in the expectation that some definite limits might be placed upon the Boyd decision. But while the court quotes Judge Bradley's language, in which he says that the two amendments are interdependent, it does not distinctly say whether his view is still adhered to. It does, however, use this significant language: "Subsequent cases (Adams and Baird) treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions." It would have done much to clear the atmosphere if the court had distinctly said that the language of the Boyd case as to the relation between the Fourth and the Fifth Amendment should be regarded as *obiter*. So long as the court continues to render such decisions as those in the Adams, Baird and Hale cases, and the broad language of the Boyd case is allowed to stand only as a piece of judicial rhetoric, no serious harm will be done. But to permit the words of a learned and eminent jurist like Mr. Justice Bradley to remain without express limitation

¹ Interstate Commerce Commission v. Baird (1904) 194 U. S. 25.

is a source of embarrassment to the lower courts and their litigants, which is unfortunate and which might be easily removed.

The decisions in the Hale and McAlister cases have placed in the hands of the government a potent weapon to compel obedience to the law. How it shall be used will largely depend upon the attitude of the trusts themselves. A just and wise enforcement of the commerce laws did not require an immediate resort to criminal remedies, and circumstances may still exist where the policy of the law may be effectively carried out by means of injunctive relief. The commerce laws deal with a regulation of interstate trade entirely new a generation ago. Business dealings which had before been regarded as justifiable both in morals and law, became in a day *mala prohibita*. Multitudes of transactions, which had not been in their general effect injurious to trade, were declared to be illegal, not because they were intrinsically immoral, or even under ordinary conditions in violation of wise economic principles, but because they enabled powerful corporations, by the aggregation of an immense amount of capital, to oppress, and ultimately to exterminate, the less powerful. It was a serious matter to prohibit by law methods of business which had prevailed for many years; and the immediate and drastic enforcement of such a law, a reasonable public opinion would neither have demanded nor tolerated. It has taken years to establish the principles upon which it must be determined what constitutes a combination in restraint of interstate trade which is prohibited by the commerce acts. But they are now so far settled that little excuse will hereafter be afforded to a person or corporation for pleading ignorance of them; and there can be no complaint of hardship if, for violations of the law in clear cases, criminal

penalties should be rigorously imposed. It is undoubtedly the fact that a large number of great corporations have in good faith obeyed the law as its scope and meaning have come to be understood, and it is to be hoped that those which still stubbornly resist its enforcement will finally submit to a legislative policy which is undoubtedly sanctioned by an almost universal public opinion. But if they do not, and if they continue to withhold information as to their transactions, they must expect that such conduct will be accepted as proof that they propose still to defy the law. The importance of the tobacco trust decisions to defeat any such disloyal policy can hardly be over-estimated.

It cannot be assumed that the decisions will remove all difficulties in enforcing the law. It is not probable that corporations will any longer incur the risk of making formal written agreements which are unlawful; but if they are determined to defy the law they will probably resort to more obscure and ingenious expedients. Evidence of such devices may not be easy to secure; yet the difficulty has now been greatly lessened. If the trusts are still able to avoid a disclosure of their affairs, it may be that some appropriate legislation may be necessary by which they shall not be permitted to engage in interstate trade except upon the condition that their affairs shall be subjected to such visitatorial power on the part of the administrative branch of the government as may be necessary to discover from time to time whether they are obeying the law. Whether public opinion will demand the enactment of such a law largely depends upon the future conduct of corporations in withholding information and in resisting the efforts of the Department of Justice to compel obedience to the law.

**ADDRESS AT THE ANNUAL DINNER OF THE
NEW YORK STATE BAR ASSOCIATION, 1919**

XIII

ADDRESS AT THE ANNUAL DINNER OF THE NEW YORK STATE BAR ASSOCIATION, 1919

REMARKS OF HENRY W. TAFT¹

MR. PRESIDENT AND LADIES AND GENTLEMEN: I have a deep sense of my unworthiness to preside over this great organization. Your own distinction, Judge Hughes, at the bar, in executive office, on the bench and in the public life of our country, has been so notable that the Association enhanced its own importance in selecting you as its president. I have no such basis for the distinguished honor conferred upon me, and I can only hope, by devotion to the interests of the association, to compensate in some small measure for the advantage of having as its presiding officer a great public figure like yourself.

As Chairman of the Committee on Law Reform it has been my duty to examine numerous projects for the reform of the law, and when I contemplate the opportunities thus presented for alluring experimentation, I am amazed at the moderation of my recommendations. The vexed subject of procedure has also fallen to my lot, and I have made some effort to clear away the underbrush obstructing the pathway to legal rights. So I have had the opportunity for making trouble, and I am not sure that the nominating committee did not conclude that the best way to avoid complications was by a diplomatic promotion.

The achievements of the bar during the war have been noteworthy. The fact that thirty per cent. of the lawyers of the country between twenty-one and thirty-

¹ Delivered at the Forty-second annual meeting held in New York City January 18, 1919.

one years of age were actually inducted into the army—a proportion far greater than that in any other occupation—gives testimony of their patriotism; while the most heroic individual episode of the war is that of the Lost Battalion in the Argonne Forest, led by a modest young lawyer of this city—Colonel Whittlesey. Such things show that the pursuit of our learned profession does not subdue the promptings of a high patriotism or the will to make even the supreme sacrifice.

A British publicist has recently said that one of the miracles of the war was the raising of an army of over three millions of men in America. The raising of this army by enforced draft was due entirely to American initiative. One of the fundamental duties of citizenship in a democracy is by serving as a soldier to aid in preserving the principles on which such a government is founded. This principle was embodied with the broadest vision in the Selective Service Law and it was carried out with no internal disturbance and with the least possible impairment of the industrial forces of the country. This truly wonderful achievement required the intuition and training of the soldier, the broad vision of a constructive statesman, and the professional skill of a trained lawyer, and the man was found in the great lawyer-soldier, Major General Enoch H. Crowder, the Provost Marshal General. His services in making the United States a potent factor in the winning of the war may fairly be ranked with the achievements of General Pershing himself.

It was General Crowder's foresight that brought the legal profession to the aid of the government. In the complicated machinery of the Selective Service plan he assigned to each member of the bar what he called "a definite place and duty in the winning of the war." Out of 131,909 lawyers in this country, 125,100 re-

sponded to his call. Never before was such an opportunity offered to lawyers to render service for which, by education and training, they were especially fitted; and they rendered it patriotically and without reward other than the satisfaction of a duty well performed. As in the days of the Roman Republic, members of the noblest families trained to the law gave free advice to the people in the Forum, so twenty centuries later the American bar has placed its services at the disposal of the people of this country in the task of building up an army to preserve modern civilization.

What public service remains for the American lawyer? In a crisis like that of to-day the highest conception of professional duty requires the lawyer to contribute to the thought of the country upon questions of public policy, for they are indissolubly linked with the subjects of his study and of his practice. President Wilson once very truly said that:

“The notable, I had almost said fundamental, circumstance of our political life is that our courts are, under our constitutional system, the means of our political development. Every change in our law, every modification of political practice, must sooner or later pass under their scrutiny. We can go only as fast as the legal habit of mind of our lawyers will permit. Our politics are bound up in the mental character and attitude and in the intellectual vigor and vision of our lawyers. Ours is so intensely and characteristically a legal polity that our politics depend upon our lawyers. They are the ultimate instruments of our life.”

But James Bryce has noted, and we all know how truly, the decline of the bar as a social influence, on account of its “diminished political authority.” This condition bodes no good for our country. Never has there been a greater need for the exercise of the highest function of the American lawyer. Never before has it

been so necessary that he should think in terms of statesmanship and should stimulate the thought of others upon the great questions of the day. Never before that he should be in the highest places in the legislative and executive branches of our government. In the process of adjusting itself to peace conditions, the country must, as never before, concern itself with its international relations, and it must guard at home against any impairment of the liberty of the citizen. It must adjust the relations between the government and the transportation companies. It must reconsider the whole subject of combinations in restraint of trade. It must adopt a fiscal policy adapted to the enormous financial burden cast upon us by the war. It must bring the rights of labor and those of capital into equilibrium. It must guard our institutions against the menace of Bolshevism. And it must preserve the authority of our courts against the invasion of novel and destructive theories.

To the extent that lawyers aid unselfishly and effectively in the solution of such great problems as these, to that extent, and to that extent only, will they place themselves in the position of influence which the bar occupied in the first half of the history of the nation. But they must move out of the atmosphere of private interests and not let their opinions on public questions be fettered by the pecuniary interests of their clients, or confine their thoughts as citizens upon great constitutional questions of the day within the narrow channel of personal interest. Above all things they must have courage and initiative. They must not only contribute to the discussion, but they must lead in a constructive way. If they do this, they may again find themselves the most influential element for good in our body politic.

**PRESIDENT'S ADDRESS AT THE ANNUAL
DINNER OF THE NEW YORK STATE
BAR ASSOCIATION, JANUARY 17, 1920**

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XIV

PRESIDENT'S ADDRESS AT THE ANNUAL DINNER OF THE NEW YORK STATE BAR ASSOCIATION, JANUARY 17, 1920

GENTLEMEN OF THE BAR ASSOCIATION AND OUR GUESTS: I first wish to express my high appreciation of the honor of being your president. I have valued the distinction and the opportunities of the office. I lay it down with a higher idea of the usefulness and the possibilities of the Association.

To our guests we extend a warm welcome. I especially greet the ladies. The solace of having them *at* our side we know. We men are now concerned lest we may not get them *on* our side.

The times are full of matters of interest to lawyers. Some we mention with hesitation.

Last year we debated the League of Nations, and, as Judge Hughes said at our last dinner, "no fatality resulted." I am not sure that a debate now would be equally free from casualties.

Another condition I forbear to enlarge upon. Our friend Mr. Wadhams, usually optimistic, feared that it might have a withering effect upon the joy of this occasion. Your numbers, however, belie his forebodings. Perhaps it is because lawyers believe as Wordsworth would have put it:

"The good die first,
And they whose throats are dry as summer dust
Burn to the socket."

The war has brought the political, social and industrial affairs of the world into an abnormal state of un-

rest. In Russia the revolt against the old order cannot be dismissed with the formula that her people should work out their own salvation, because its psychological effect has permeated far beyond Russia itself.

The Bolsheviks proclaim to the world that ordered liberty, as the rest of the world understands it, is a mere gesture or metaphor; that freedom of speech and of the press, the equal protection of the laws, the right to assemble and to petition the government, the prohibition of unreasonable searches, seizures, and cruel and unusual punishments, and the safeguarding of life, liberty or property by due process of law, merely facilitate the infliction of injustice.

They would substitute the despotism of the proletariat over every other class, the subversion of all freedom, morality and religion, and they would contemptuously reject patriotism and love of country as a moral force. But the most amazing thing is that they seek to perpetuate their rule, not by the consent of the governed, but by the will of a small minority sustained by force.

Lenin himself has boasted that control of 180,000,000 of people is in the hands of not more than 200,000 industrial workers in the cities. This is made possible by giving the Red Army extraordinary privileges in the material things of life, and by vesting in them eight times the political power of the industrial workers in the city and eighty times that of the peasants who constitute 90 per cent. of the population.

This rule of the minority was accomplished not so much by military force as by industrial strikes. The new possibilities in the use of that weapon have no doubt had a psychological relation to certain phases of recent strikes in other parts of the world.

In England the coal strike and the railroad strike struck at the very life of the British people, who had to unite in self-protection to avoid the terrible effects of a fuel famine and of the paralysis of the transportation system. The police strike in London threatened to overthrow law and order. The Boston police strike was a similar movement, of which Governor Coolidge truly said: "There is no right to strike against the public safety by anybody anywhere at any time." The coal strike here became a matter of national concern, not because the employers were illegally threatened by loss, but because the vital necessities of the public compelled them to become a party to a controversy in which they had no other concern.

Our great business combinations, the interlocking of our essential industries, their interdependence and the far-reaching effect of an interference with the functioning of any of their parts, make a great strike to-day of far greater moment than at any time in our history. Whether a check in our industrial life result from the unreasonable, selfish or arbitrary policy of employers, or from the ill-considered or tyrannous action of the employees, in either case it tends to deprive the people of the right to pursue happiness in their own way, and our government ceases to derive its "powers from the consent of the governed," but from the dictation of a group.

No one now denies the right of industrial workers to unite to better their condition. But if in increasing their participation in the profits and management of industries they do not avoid excessive and unreasonable resort to strikes, we shall come perilously near a condition where minorities and not majorities rule.

Another subject engages the attention of the public. We are in a maelstrom of constitutional agitation.

If we could personify our fundamental charter our emotions would be repeatedly aroused by its merciless pulling and hauling. No question of vital national importance arises that does not evoke divergent views. One school of publicists insists upon the most extreme remedies that can be invoked for the cure of our ills. Another stands aghast at the remedies proposed by alarmists as an assault upon the most cherished principles of civil liberty.

Thus, perhaps, the police are a little indiscreet and arrest a few fanatical but harmless paraders. A sensible police magistrate discharges the prisoners with an apology, and with good humor admonishes the police. But straightway persons charged by Divine Providence with the custody of the charter of our liberties spring forth and announce that the curtain has fallen on the last act of the tragedy of the Constitution. And even one of our great journals gives up the game in these despairing words:

“There is no freedom of speech or of the press left, except by consent of government. Police authority everywhere is denying to small minorities whose doctrines are unpopular the right of free speech. . . .

“Plainly, the American people are getting away from first principles; they are forgetting their traditions and losing sight of their ancient landmarks.”

Without the conviction of a single person, without the menace of a doubtful statute, without a decision of the tribunal whose decisions have ever kept the principles of civil liberty undefiled, the right of “freedom of speech or of the press” suddenly becomes, to all intents and purposes, deleted from the scroll of the Constitution. And yet, in the journals which our busy life

permits us to read, we daily wade through columns of print going to the very verge not of freedom, but of license. And this free discussion will go on unchecked, except as the Supreme Court recently said, that the law will "not protect a man in falsely shouting fire in a theatre and causing a panic."

Now look at the other side of the picture.

Seventy bills are introduced in Congress, inspired by a determination to suppress by the most violent permissible means the menace of Bolshevism. Acts classified as sedition are by some of these bills even declared to be treason and punishable by death. Socialist assemblymen are put to the proof of their patriotism before being permitted to represent their constituents. And radicals all over the country are herded in one grand spectacular roundup.

But no accused person can suffer unless he not only intends, but attempts by violence, to overthrow our institutions. None of the seventy bills has been passed, nor will any one find himself in jail until the Supreme Court says they are constitutional. The herded Bolsheviks are entitled to writs of *habeas corpus*, whether they are citizens or aliens. And the Assemblymen may acquire such fame as martyrs as they never before dared to aspire to.

Such agitations are not a menace to our institutions. They test their value. Only by discussion of some concrete question can the interest of the American people as to the meaning and application of the Constitution be aroused. By that process, however, they can always be depended upon to understand the nature of our institutions. We must not, therefore, despair if in open discussion there is exaggeration and if desperate remedies are suggested. That is inevitable. But by

the ultimate settlement of the ever-recurring problems of government by constitutional methods, our institutions constantly gain in stability.

We hear much in these post-war days of Americanism. But mere emotional response to noble sentiments of patriotism will not avail to protect the body politic against assaults upon our institutions, unless they be followed by enlightened constructive effort. Insidious influence sometimes emanates even from pulpits, colleges and public prints. The parlor Bolsheviks add a gloss of respectability, of culture, of religion, and even of a spurious patriotism, to the efforts of both the ignorant alarmist and the disloyal agitator. Too often they confuse the Soviet Ark with the Mayflower.

With such influences at work the most useful kind of Americanism that I know is that which, inspired by adherence to our national traditions, insists upon sanity in counsel and steadiness in act. And there is no class in the community so well fitted by education, experience and temperament as lawyers for the discharge of that lofty function.

**ADDRESS AT THE DINNER
TO JUDGE O'BRIEN**

XV

ADDRESS AT THE DINNER TO JUDGE O'BRIEN¹

THE committee which arranged this dinner has had some troubles, and its chairman has asked me to announce that several disquieting things have happened without its fault. The purpose in giving this dinner was to tender a tribute to the Honorable Morgan J. O'Brien, and yet the committee feels much aggrieved to find that Hamlet doesn't figure on the first page of the program, and the chairman has asked me to announce that this is entirely through a printer's error. However, I think that is a matter which the honorable gentleman can outlive.

There is another subject which causes us all keen regret, and that is the enforced absence of the honored president of this association, Judge Cullen. He certainly is the "grand old man" of this organization and, barring the question of age, may be deemed to be one of the grand old men of our profession. At the last moment however, he was obliged to give up being here because a sickness which has detained him at home for some days finally led the doctor to advise him that he must seek another climate. The sudden call upon me as vice president of the association to take Judge Cullen's place raised with me the question which has excited so much attention lately; that is, the question of preparedness, and I have really never had so much apprehension about it as I have

¹ Remarks of Mr. Taft, toastmaster, at the Annual Bar Dinner of the New York County Lawyers' Association, given in honor of Hon. Morgan J. O'Brien, February 26, 1916.

to-night. However, I must do the best I can. Mr. Strauss, my fellow vice president, and myself have had something of a stage play as to which of us would preside, but his modesty has prevailed.

I have a diffidence about addressing you gentlemen. And yet you don't seem so very formidable. I have no such hesitation about addressing the courts, so numerously represented here to-night, but that is a matter of habit. When it comes to addressing the keen intellects of the bar, however—well, I hesitate. I am reminded of a story that Lord Campbell relates of Lord Eldon. He was obliged to address a goldsmiths' dinner, and was in a high state of trepidation. He said: "I had just as lief address the members of Parliament or the law lords in Parliament as I would so many cabbage plants, but I find a great diffidence about addressing the goldsmiths." I have the same feeling to-night.

I understand that Judge Cullen, who, in his way, is a little bit of a martinet on such occasions as this, has taken pains to write to each of the speakers and place a limit of time upon them. I don't know what the limit is; I haven't asked any questions; but, whatever it is, I am going to remove it. I think a fair spirit of reciprocity to the judges of the Appellate Division, which has now so generously extended the time for arguments of counsel, demands that all limits on the length of the speeches to-night, at least of those of the judges, should be removed. So, as Shakespeare says, gentlemen, you will for the time being have to take your place on the "windy side of the law." But I will venture a story in that connection.

There come to New Haven from time to time on Sundays representatives of rural churches to address the students in the chapel of Yale College. The tend-

ency of the rural preachers to extend their sermons is not a thing which is congenial to the students. On one occasion one of these preachers came to New Haven who had a little bit more consideration than is usually characteristic of that class of pulpit orators, and he said: "Mr. Hadley, is there any limit of time that is imposed upon the ministers when they address the students?" "Oh, no, not any limit at all," Mr. Hadley said, "but I think I ought to say to you, sir, that there is a tradition that no souls are ever saved after fifteen minutes."

Now, I hope that the gentlemen who are to come after me don't take these remarks as personal. Perhaps they would say that I am talking too long myself and that I had better sit down. However, I want to say a word about what this and other associations have been doing this year. A good many of us in this Association have been drawing reform constitutions for the state and reform projects of procedure, and, like the three tailors of Tooley Street, we have presented them to the world with some circumstance; and nothing more has happened. But it has all been beneficial. Subjectively it has done those of us who have done the work some good. It has cultivated our power of legal analysis. It has given us an opportunity of exercising our originality. And originality and the power of analysis are great things in the law—of a great deal more significance oftentimes than deadly precision. Of the reasons that are given to support the opposing contentions of counsel, one or the other must of necessity be wrong, and we half the time give reasons that prove to be bad. I always believed in that form of instruction in the law which gave credit for reasons whether right or wrong. I remember there was an old lawyer who used to be a professor in the Cincinnati Law School

when I attended there. His name was Judge Yaple, and he especially believed in the value of originality of thought. He always gave credit to his students for it. I remember on one occasion he asked a student what was the difference between a conditional limitation and a contingent remainder, and the student answered, "Damned little," and he gave him fifty per cent.

Mr. Choate has characterized this Association as the great democratic association of the state. I choose to think that there is no democracy or aristocracy in our profession except the aristocracy of character and fidelity and public service. But what Mr. Choate meant was that this Association was more comprehensive in its membership than any other association, certainly than any other active day-to-day association in this country, and I want to say just a word in favor of such associations. They do great good. No individual among us can attempt to extend the sphere of his influence very widely in a population like the city of New York of six millions of inhabitants. The bar here now approaches twenty thousand members. It becomes absolutely essential for the preservation of the moral health of our profession that we should associate ourselves together in order to defend the standards of correct conduct by which we should all be guided. Indifference to matters of ethical conduct and professional conduct is sure to grow up in a profession of the size of that in this city unless its individual members have some consciousness that there are those in the profession watching over them and vigilant to restrain them from lapsing into practices which would do the profession no credit. In a bar of two or three hundred I conceive that such associations are little needed; but in a bar so numerous as

ours we need associations of the members of the bar to organize against the invasion of our profession by improper practices. I, for one, would like to join other similar associations that would include the entire bar of the city in order that by concerted efforts we might have a substitute for that kind of public opinion which prevails at a smaller bar and which restrains members within the correct lines and holds them up to the highest standards of professional ethics. Such associations if properly conducted are an effective means to prevent the bar from falling into disrepute on account of that small minority who do not hold its traditions pure. Now, this Association has been at the forefront in developing a system of professional ethics. It is a pretty elaborate system. The Committee on Professional Ethics has been doing grand work in keeping out of the profession those who are attempting to commercialize it and those who are attempting to bring the practice of the law into the hands of the corporations. I wish to speak also of the work of the City Bar Association—I think the two associations have supplemented each other and have done splendid work, and I am glad to have the opportunity of paying this tribute to them both.



SPEECH OF MR. HENRY W. TAFT

XVI

SPEECH OF MR. HENRY W. TAFT ¹

MR. PRESIDENT, MR. AMBASSADOR, MR. MINISTER, LADIES AND GENTLEMEN: When your president asked me to say a few words to-night, I had no idea that I was to have the pleasure of attending a function of such splendor as this, nor did I at all appreciate the strength and dignity and importance of this organization. I told the president that I would take pleasure in saying a word of greeting as I had arrived fresh from your native land. I wish I could address you in French, but the only French that I know I learned in French Canada, and while the Canadians say that theirs is the French of Molière and that it is the Parisian French that has become corrupted in these hundreds of years, yet I am afraid that if I attempted to speak the Canadian French I might incur the hostility of these formidable military guards that I have seen standing here, whose duty it is, no doubt, to protect among other things, the purity of the French language.

As the Ambassador has said, I have come direct from the Chicago convention and so I might have said something about politics; but the president of your association was good enough to send me a copy of your year book, and I there observed, at a page which he had considerably turned down, a by-law which was worded: "All political discussions are excluded." Furthermore, perhaps you are not interested in politics. We become sometimes preoccupied with our own environment and mistakenly think everybody is in-

¹ Delivered before the American Chamber of Commerce in Paris, July 4, 1912.

terested in those things that we ourselves are engrossed with. In that connection I might mention the experience that my wife had on the steamer coming across the ocean, when she sat beside a lady with whom she entered into casual conversation. She was an American lady who was on her way to her twentieth cure at Carlsbad, and my wife said to her among other things that we had been to the Chicago convention. The lady quite opened her eyes and asked: "That was a convention of doctors, was it not?"

I had the pleasure of meeting in New York the delegates who were sent to the Champlain Tricentenary, and amongst others my very distinguished friend upon my left. I attended the function in their honor, and I think our hospitalities were pretty persistent and they displayed unusual endurance. As I stand here I am reminded of a speech—I think it was Baron d'Es-tournelles de Constant who made the speech, or perhaps it was one of the other distinguished gentlemen. He quite seriously discussed the question of the high cost of living, which subject has very much interested our country, as well, I think, as all other countries of the world. He said: "If you would send your American women to learn the economy of the French women you would take a step in advance." My experience with the French women has not yet convinced me of the truth of his remark, but I must say to you that so far as I myself am concerned, my experience has been with the French women who keep the shops in the Rue de la Paix, and I have not found them especially good teachers of economy.

Mr. President, I am a member of the committee which has been appointed to secure for the United States the celebration of a saner Fourth of July. We seek less noise and more sentiment, more expression of

patriotism which will recall to our memory those great men who have given us the priceless boon of liberty regulated by law. Such an occasion as this I count as most useful in that direction, and I hope that we in America may emulate the example of the American Chamber of Commerce in Paris in celebrating this great anniversary by recalling to mind, as the eminent gentlemen here present have already so eloquently done, the principles that those wise men of one hundred and thirty years ago embodied in that great instrument of free government, the Constitution of the United States, and the sentiments which they expressed in that eloquent dissertation upon the rights of man, the Declaration of Independence.

This Chamber of Commerce can perform a most useful function in continuing the present friendly relations between France and America. I cannot, at this late hour, go over the various possible fields of its usefulness; but, to mention one, in the important question of the tariff, your body can do much to eliminate the misunderstandings that constantly arise in relation to the trade between the two countries. We are surely approaching an era in our country where the schedules of our tariff will be based upon the strictest investigation of the facts, and that is a most difficult thing under present conditions. We have, however, established a Tariff Commission, whose duty it is to investigate cost of production and cost of manufacture. A body like yours can be most useful in aiding such a commission in ascertaining facts, and if the facts be ascertained beyond dispute, our Congress cannot resist the force of public opinion in considering them in framing the schedules of the tariff law. If that be done, and if the principle of our protection be preserved upon such a basis, nobody can complain. Then another aid to

international commerce or trade is the representation to the French public of the facts in relation to American securities. I am glad to observe that in recent years there has been an effort to introduce on the French market our American corporate securities, and this body can be most useful in eliminating misunderstandings that may easily arise in relation to them.

I cannot close without one word on another subject of the highest importance, and in relation to which no man in the world has rendered such valuable services as my distinguished neighbor, Baron d'Estournelles de Constant. That is the subject of arbitration. At this moment, perhaps, in the stress of political campaign, the subject will be lost sight of. It has suffered some vicissitudes in the Senate of the United States, but I feel confident that its trials are but temporary, and that with the aid and the coöperation of France and other nations we can, for peace's sake, ultimately have, with all of the great nations, arbitration treaties which will reduce the risks of war to a minimum. In that connection I think we are to be congratulated that our countrymen have now in charge of the diplomatic negotiations such able representatives as Governor Herrick and Mr. Jusserand. Governor Herrick I have known for many years. I am sure you will come to like him as much as we all have come to like him in our country. France ought to feel complimented that she has succeeded in getting Governor Herrick. I betray no state secret, because it is known in our country, that the suggestion has been made that he should represent our government at the court of some of the other great nations of the Continent, but that he has always withstood the temptation, and until now America has not been able to avail of his services. I know he feels in sympathy with the spirit

of the French people, and I feel confident that he will soon acquire their language and will no longer modestly attribute the success of his public addresses to the admirable eloquence, as an interpreter, of Baron d'Estournelles de Constant. Mr. Jusserand I know very intimately. We are all very devoted to him in America. He knows our foibles and he does not hesitate in his most good-natured way and without bitterness to call our attention to them. He is *persona grata* of the most pronounced type to our government and to our people. He has done much to promote arbitration treaties, and I feel sure will do more. Among other things, and I say this after I have listened to the eloquent words of my friend the Baron, few American orators can compare with Mr. Jusserand in beauty of diction and in eloquence when he speaks in English. With two such representatives as these, it would seem a fair promise that the relations between these two countries should become warmer and warmer.

I thank you, ladies and gentlemen, for your attention.

JOHN LAMBERT CADWALADER

AN APPRECIATION

XVII

JOHN LAMBERT CADWALADER

AN APPRECIATION ¹

JOHN LAMBERT CADWALADER had none of that kind of reputation which sometimes vaguely emerges from the glamour of public life; for he had held but one office and that for only a brief period many years ago. But his services to institutions for the dissemination among the people of knowledge and culture, his leadership in his profession, the influence of his interesting personality and high character, and the friendship and respect which he commanded among the foremost men of his time, justly entitle him to be regarded as an American citizen of high distinction.

Mr. Cadwalader was born at Trenton on November 17, 1836, and died in the city of New York on March 11, 1914, in the seventy-eighth year of his age. His ancestors had from Colonial days been persons of consequence in Pennsylvania and New Jersey. He graduated at Princeton College in 1856; and he was for many years one of its most active trustees. He attended the Harvard Law School; and after graduating there he practiced law in New York City until he became, in 1874, Assistant Secretary of State of the United States, in the administration of General Grant. After leaving the State Department in 1876 he made a journey of observation around the world, during which he visited many interesting places in the Orient not then readily accessible. Upon his return to New

¹ Paper read at the opening of the Trenton Public Library, April 6, 1915.

York he resumed the practice of law. In 1869 he had been one of the small number of lawyers who united in founding the Association of the Bar of the City of New York, which grew out of a movement to elevate the judiciary of the state which had fallen into disrepute during the Tweed régime. Many years afterward he became the President of the Association—an honor generally regarded as denoting leadership at the Bar of New York.

That Mr. Cadwalader gained high repute as a lawyer was not due to exceptional erudition nor yet to uncommon powers of advocacy. It was still less due to his willingness to yield to the tendency of modern conditions which too often obscure high professional ideals by expecting from a lawyer that he shall also be a man of business or even have some share in his client's enterprises. But Mr. Cadwalader was one of the old type of lawyers who assisted their clients to a wise solution of their difficulties or, if a contest was inevitable, delighted to "strive mightily" for the protection of their rights. His ability to summarize and state to a court in terse and incisive phrase the substance of a controversy was surpassed by few, if any, lawyers of his time, while his instinctive sense of justice gave him a grasp of principle which made him less prone than most men to a reliance upon a "codeless myriad of precedents." No lawyer could more readily (I had almost said gayly) divest himself of the encumbrance of technicalities and penetrate to the heart of a situation. While he was practical, sympathetic and always helpful, he never resorted to indirection or other tortuous expedients. He was especially effective where seemingly irreconcilable differences were to be composed. In such matters he long occupied a unique position as an adviser; and with years and experience he

grew to be one of those rare individuals whom a community invests with the character of a sage.

But it is his unselfish and fruitful services to the public that compel us to pay signal honor to his memory. His reputation was closely linked with the New York Public Library, and at the time of his death he was President of its Board of Trustees. More, perhaps, than to any other man was it due to him that that institution was established on a foundation broad and permanent. This was the culmination of many years of useful service to the public libraries of the city. And those who seek in heredity the springs of human action will find peculiar interest in the fact that Mr. Cadwalader's great-grandfather, Dr. Thomas Cadwalader, for many years a Colonial Councillor of Pennsylvania, was one of the first board of directors of The Library Company of Philadelphia, founded in 1731 largely through the efforts of Benjamin Franklin, who describes it in his autobiography as the "mother of all North American subscription libraries," and in the further fact—of especial interest on this occasion—that this same Doctor Cadwalader, having been in 1746 the first Burgess of Trenton, himself established in that place, prior to 1750, a public library, some of the volumes of which are still extant. While these early essays in library work were for many years necessarily on a limited scale, they contained the germ of an idea, long since generally accepted, that it is necessary to afford to a self-governing people opportunities for enlightenment, if their institutions are long to endure. And it is of the greatest interest to contrast the pioneer efforts of Franklin and his coadjutors in 1731, with the foundation, nearly two centuries later, of the magnificent institution in New York which, in the opportunities extended to the public for learning and re-

search, and in the convenient access to good literature afforded by the circulating department, promises soon to surpass any similar institution in the world.

Mr. Cadwalader had been a trustee of the Astor Library, and early saw the importance of finding some means of availing of a large bequest of Samuel J. Tilden, so that it could be used in bringing together the Lenox Library, the Astor Library and a large number of smaller libraries in one vast institution. Many legal difficulties had to be removed by legislation, which was largely devised by him. When that was obtained it still remained to weld together the existing libraries, many of which were loath to surrender their autonomy and independence. Due largely, however, to the constructive genius of Mr. Cadwalader and to his indomitable persistence, tactful wisdom and practical experience, a plan was carried through by which there was established upon an enduring foundation one of the greatest consultation and circulating libraries of modern times. The difficulties in reaching this result seemed at the outset insurmountable; and the solution of the problem, as the then President of the United States said at the public opening of the library building, "required genius and statesmanship."

The rare aptitude of Mr. Cadwalader for work of this character led to his services being much sought for in connection with other institutions of a public, though not of a political or governmental, character. At the time of his death he was a trustee of the Metropolitan Museum of Art, the American Museum of Natural History and the New York Zoölogical Society, all in the city of New York; while he was closely connected as trustee with the organization and management of the Carnegie Institution of Washington, and the Carnegie

Endowment for International Peace. The duties of these trusteeships were never performed in a perfunctory manner; for he devoted much of his time to them, being always one of that minority upon whom the burden of such work usually falls and on whose enthusiasm successful results always depend. Of frail physique, the burden was heavy, but his was a spirit which would not suffer, to the day of his death, even a partial retirement from such activities as these.

Three universities, Pennsylvania, Princeton and Harvard, conferred upon Mr. Cadwalader the degree of LL.D. He was justly proud of this distinction; for while his achievements were of undoubted merit they were not of the kind which usually evoke academic honors from so many of our great universities.

Mr. Cadwalader was the intimate friend and constant companion of many of the most eminent men in the councils of the nation and in the world of science and art. Such Americans as his brother-in-law Dr. Weir Mitchell, Colonel Higginson, Frank Millet, Dr. Billings, J. Pierpont Morgan, Senator Root, James C. Carter, Dr. McBurney, Whitelaw Reid and Joseph H. Choate were some of those numbered among his companions; while at his hospitable home in the Scotch Highlands he gathered Englishmen distinguished in statesmanship, art and learning. Among these he was esteemed for his high character, his brilliant wit, the constancy of his friendship, his refined but cordial hospitality and his wise counsels. He had a genius for friendship, and was a believer in the saying that "life is to be fortified by many friendships." He had great vivacity in conversation; and his pointed comment and witty repartee constantly enlivened the circle of his friends. This is an aspect of his personality which only those who enjoyed his intimacy can well appre-

ciate; for the play of his wit was so spontaneous and its point so dependent on its pertinency to a quickly passing situation, that an attempt to reproduce instances would do him scant justice; and yet this quality played a large part in making him a charming companion. His devotion to the rod and the gun must receive a word, since salmon fishing, grouse shooting and other such diversions he truly loved; and he had difficulty in seeing how there was any salvation for a man whose soul was dead to the fascination of such sports.

The way in which Mr. Cadwalader expressed his intention to make a gift to this library cannot but evoke a smile from those who knew him well, for it recalls the amusingly ingenious ways in which he concealed his benefactions or disparaged his acts of personal kindness. He desired, as he wrote to your president, that the library should be made "as efficient as any in the state," that he should have "no recognition in any way," because he had "no motive other than to benefit the subject." And he would have deprecated, probably forbidden, such a demonstration as this; for in such things he was diffident to the point of shyness, and more than content with a sense of duty well performed.

It was his devotion to the place of his birth, mingled with a just pride in his New Jersey ancestors, that turned his mind to the historical city of Trenton and led to the benefaction which made possible the completion of this beautiful and commodious library building. In the Revolutionary War, in the establishment of our national government and in the public affairs of our national government and in the public affairs of New Jersey and Pennsylvania, the Cadwalader family had borne a conspicuous part. He was accustomed to say of his forbears that they had done "something of

account," usually adding, as if to disavow an intention to boast, a humorous comment on some foible which family tradition had preserved. But in truth his ancestors had enjoyed distinction in the affairs of state and nation and were of those entitled to stand high in the ranks of that kind of aristocracy which exacts high ideals, self-abnegation and patriotic, faithful and efficient service. To such ancestors as these a lofty monument might have fitly been erected, but it would have been alien to his nature for him to preserve their memory in that way; for his whole life showed his belief that "monuments themselves memorials need." And no memorial could be more true to the character of John L. Cadwalader than that which associates him and his family name with the idea of service to the people of this city by affording to them an adequate opportunity for the pursuit of knowledge.

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